TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 205

WESTERN MARYLAND RAILWAY COMPANY,
APPELLANT,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED JULY 18, 1950.

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 20, 1950.

Form No. 11

Report Received by Commission
Date 3/15/46

STATE TAX COMMISSION OF MARYLAND
Union Trust Building
Baltimore-1, Maryland

1946

GROSS RECEIPTS TAX REPORT FOR THE YEAR ENDED DECEMBER 31, 1945

(File this report on or before March 15 following close of year.)

1. Name of Taxpayer WESTERN MARYLAND RAILWAY COMPANY

2. Mailing address 401 Standard Oil Building, Baltimore 2, Md.

3. State and year of incorporation (if incorporated) Maryland and Pennsylvania - February 15, 1917

4. Taxpayers subject to tax imposed under Art. 81, Sec. 95:

Business Classification	Total System Mileage	Total Maryland Mileage	% Total Mileage located in Maryland	Allocation Ratio
Railroad worked by steam				All track mileage
Telegraph or cable				Wire mileage
Express or transportation	See Schedule 1			Car mileage
Parlor and sleeping car				Car mileage
Telephone				Wire mileage
Oil pipe line				Pipe line mileage
Electric light and power				
Gas				
Safe deposit and trust (itemize under Item 5)				

NOTE: Any allocation factors, other than those above specified, shall be used subject to approval by the Commission.

Itemization of gross receipts, and apportionment to Maryland:

Class of Receipt	Gross Receipts from all Sources		Non-Operating Receipts from all Sources	
	System	Apportioned to Maryland	System	Apportioned to Maryland
	See Schedule 2			
Total				
Total Gross Receipts apportioned to Maryland				
Deduct — Non-Operating Receipts apportioned to Maryland				
Assessable Receipts apportioned to Maryland				
Deduct — Assessable Receipts on which exemption is claimed				
Amount on which State Tax is computed				

NOTE: If exemption is claimed with respect to any gross receipts, submit herein or by separate schedule, sufficient and detailed information to substantiate such claim;

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5. Safe deposit and trust companies subject to tax imposed under Art. 81, Sec. 95:
Estimated amount of property held in trust: Real $.....; Personal $.....
Itemization of gross receipts and apportionment to Maryland:

Class of Receipt	Gross Receipts from all sources		Gross Receipts from all sources in Maryland	
Safe deposit business				
Trust business, including business of acting in a fiduciary or representative capacity				
Total				

6. Reference to legislative acts imposing gross receipts tax on companies other than those classified in Items 4 and 5:
Chapter..... Acts.....
Itemization of gross receipts and apportionment to Maryland:

Class of Receipt	Gross Receipts from all sources		Gross Receipts from all sources in Maryland	
Total				

7. Affidavit: E. T. STAFF, General Auditor (Signature and Official Title) (Corporate Seal)

STATE OF MARYLAND City of Baltimore, to wit:

On this 14th day of March 194 6 before me, the subscriber, a Notary Public of the State and City aforesaid, personally appeared E. T. Staff the General Auditor of the within named corporation and made oath in due form of law that the statements contained in this report are true and correct to the best of his knowledge and belief.

As witness my hand and Notarial Seal (Notary Public) (Notarial Seal)

Leonard W. Bair
My Commission expires May 5, 1947

Computation of tax by State Tax Commission of Maryland

Amount on which State Tax is computed		State Tax on Gross Receipts: Rate	State Tax on Gross Receipts: Amount	
$		½%	$	
		1%		
548,760		1¼%	6,859	50
		1½%		
548,760		2%	10,975	20
12,122,302	62	2½%	303,057	56
$ 13,219,822	62	Total	$ 320,892	26

Report examination made: March 29, 1948

Date 3/28/46 By H. H. B.

Date of notice of assessment .....

Date assessment entered .....

Approval of Commissioners:

(a) (S) JOS. H. A. ROGAN

(b) (S) OWEN E. HITCHINS

(c) .....

[fol. 2] WESTERN MARYLAND RAILWAY COMPANY

Schedule 1

Gross Receipts Tax Report

State of Maryland

Mileage—December 31, 1945

Length of line per statute (main track mileage)

System	Maryland	%
835.21	268.75	32.1775

Gross Receipts per Schedule 2	$33,156,236.74
Apportioned to Maryland at 32.1775	$10,668,848.07

Per request of State Tax Commission (all track mileage)—

System	Maryland	%
1,376.33	548.76	39.8713

[fol. 3] WESTERN MARYLAND RAILWAY COMPANY

Schedule 2

Statement of Total Taxable Receipts Apportionable under Statute for Year 1945

Freight Revenue per Annual Report	$32,653,479.70	
Passenger Revenue per Annual Report	515,051.20	$33,168,530.90
Less—		
Towing	280,886.01	
Trackage Tolls	25,481.50	306,367.51
Taxable Freight and Passenger Revenue		$32,862,163.39
Excess Baggage	259.07	
Mail	50,952.04	
Express	28,714.66	
Other Passenger Train	1,979.81	
Milk	1,286.34	211,635.00
Switching	128,443.08	
Taxable Incidental Revenue		
Station and Train Privileges	1,654.48	
Parcel Room	3.10	
Demurrage	78,946.58	
Detouring and use of Tracks	1,834.19	82,438.35
		$33,156,236.74

[fol. 4] WESTERN MARYLAND RAILWAY COMPANY

Schedule 3

Statement of Non-Operating Receipts for the year 1945

		System	Maryland
Storage—Freight—			
New Pier Revenue	$39,147.09		
Other Freight	705.43	$39,852.52	$39,386.83
Storage—Baggage		14.05	12.05
Grain Elevator		506,920.89	506,920.89
Rent of Buildings and Other Property		53,450.81	46,325.45
New Pier Revenue		94,854.72	94,854.72
Miscellaneous		11,579.06	4,156.57
		$706,672.05	$691,656.51

[fol. 5] NOTICE OF TENTATIVE ASSESSMENT

Miscellaneous

STATE TAX COMMISSION OF MARYLAND

504 Union Trust Building

Baltimore, Md.

Gross Receipts

March 21, 1946

To the Western Maryland Railway Company

401 Standard Oil Building, Baltimore 2, Maryland

This is to notify you that a tentative assessment has been entered against your corporation for the current year as set forth below, and that the same will become final and conclusive unless written application for a change therein shall be presented to the Commission within fifteen (15) days from the date of this notice.

STATE TAX COMMISSION OF MARYLAND

Albert W. Ward, Secretary.
Per Henry E. Reinhard

Amount on which State Tax is computed	Rate	Amount
$548,760.00	1¼%	6,859.50
548,760.00	2%	10,975.20
12,122,302.62	2½%	303,057.56
$13,219,822.62		$320,892.26

[Vol. 6] PROTEST

WESTERN MARYLAND RAILWAY COMPANY

Standard Oil Building

Eugene S. Williams
Vice President and General Counsel

Baltimore 2, Md., March 23, 1946

State Tax Commission of Maryland
Union Trust Building
Baltimore 2, Maryland

Gentlemen:—

Western Maryland Railway Company has received notice dated March 24, 1946, that for the year 1946 the Commission has made a tentative assessment for gross receipts taxes of $320,892.26, based on gross receipts of $13,219,822.62 for the calendar year 1945, which is the amount of total gross receipts apportioned to the State of Maryland.

Western Maryland Railway Company objects to and protests this assessment for the reason that it is incorrect and grossly excessive, and is erroneously and incorrectly apportioned upon the basis of all track mileage of Western Maryland Railway Company, whereas the same must under the applicable law be apportioned in accordance with the main line mileages.

A hearing upon this protest is requested.

Very truly yours, Western Maryland Railway Company, By: (S) Eugene S. Williams, Vice President

[fol. 7] WESTERN MARYLAND RAILWAY COMPANY

Standard Oil Building

Baltimore 2, Maryland

Eugene S. Williams, Vice President and General Counsel

September 2, 1947

State Tax Commission
Davison Building
Baltimore 2, Maryland

Gentlemen:—

The gross receipts tax returns of Western Maryland Railway Company for 1945, 1946 and 1947 are incorrect in the light of certain legal developments which have occurred since they were made and which are hereinafter discussed, to the extent that they include the gross receipts which this Company derived from the transportation of exported or imported freight. Western Maryland Railway Company, therefore, protests the inclusion of any gross receipts of this character in the taxable gross receipts for the years 1946 and 1947, and asks that the tax paid on such receipts for the year 1945 be refunded. The assessment for the latter year has been appealed to the Circuit Court for Baltimore City and the appeal is as yet undisposed of. Amended returns attached hereto set forth for each of the years above indicated the gross receipts of this Company from transportation of export and import freight, and which we request be eliminated from total gross receipts.

Taxation by the State of Maryland of gross receipts from the transportation of exported and imported freight is unlawful under Article I, Section 10, Clause 2 of the Constitution of the United States, as recently construed by the Supreme Court. That clause provides as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United

States; and all such Laws shall be subject to the Revision and Control of the Congress."

In Richfield Oil Corporation v. *State Board of Equalization* (November, 1946), 91 L. ed. 123, the Court held that a California tax on the gross receipts from retail sales could not be applied to the proceeds of the sale of exported oil because the above quoted constitutional clause is an absolute prohibition against "any" exercise of taxing power by the states in this field. The Court specifically rejected the argument that the tax, being an excise tax on the privilege of conducting retail business and measured by the gross receipts thereof, is not, therefore, an impost or duty on the export itself within the meaning of the Constitution. On this point the Court said:

[fol. 8] "The prohibition contained in the import-export clause against taxation on exports clearly involved more than a mere exemption from taxes laid specifically upon the exported goods themselves."

In the still more recent case of *Joseph* v. *Carter & Weeks Stevedoring Company* (March, 1947) 91 L. ed. 720, the concurring opinion of Mr. Justice Douglas who wrote the 7 to 1 majority opinion in the *Richfield Oil Corporation* case, significantly observes that the import-export clause as construed in the Richfield case would prevent local taxation of gross receipts from the business of handling import and export freight.

These interpretations require the conclusion that the State of Maryland cannot include among the gross receipts which it subjects to tax, any gross receipts from the business of transporting freight which is, in fact, exported or imported.

Perhaps, it should be further pointed out that *Freeman* v. *Hewit*, 91 L. ed. 201, casts a very serious doubt on the validity of any taxes upon the gross receipts from interstate commerce. In at least one case since that decision a State court has held that the commerce clause as there construed prevents state taxation of the gross receipts from interstate commerce. *Albuquerque Broadcasting Company* v. *Bureau of Revenue* (New Mexico Supreme Court, August 11, 1947).

It is not our intention to raise this question here, however, except for the purpose of indicating that it is an additional reason why relief should be accorded on the lesser export and import item, as herein requested.

Very truly yours, Western Maryland Railway Company, By (S) Eugene S. Williams, Vice President and General Counsel.

[Here follow 2 photolithographs, side folios 9; 9a]

8A

Form No. 11 - 4

Report Received by Commission

Date .....

STATE TAX COMMISSION OF MARYLAND
Union Trust Building
Baltimore-1, Maryland

AMENDED

1946

GROSS RECEIPTS TAX REPORT FOR THE YEAR ENDED DECEMBER 31, 1945

(File this report on or before March 15 following close of year.)

1. Name of Taxpayer ..... WESTERN MARYLAND RAILWAY COMPANY

2. Mailing address ..... 401 Standard Oil Building, Baltimore 2, Maryland

3. State and year of incorporation (if incorporated) ..... Maryland and Pennsylvania-February 15, 1917

4. Taxpayers subject to tax imposed under Art. 81, Sec. 95:

Business Classification	Total System Mileage	Total Maryland Mileage	% Total Mileage located in Maryland	Allocation Ratio
Railroad worked by steam	See Amended Schedule 1			All track mileage
Telegraph or cable				Wire mileage
Express or transportation				Car mileage
Parlor and sleeping car				Car mileage
Telephone				Wire mileage
Oil pipe line				Pipe line mileage
Electric light and power				
Gas				
Safe deposit and trust (itemize under Item 5)				

NOTE: Any allocation factors, other than those above specified, shall be used subject to approval by the Commission.

Itemization of gross receipts, and apportionment to Maryland:

Class of Receipt	Gross Receipts from all Sources		Non-Operating Receipts from all Sources	
	System	Apportioned to Maryland	System	Apportioned to Maryland
	See Amended Schedule 2			
Total				
Total Gross Receipts apportioned to Maryland				
Deduct — Non-Operating Receipts apportioned to Maryland				
Assessable Receipts apportioned to Maryland				
Deduct — Assessable Receipts on which exemption is claimed				
Amount on which State Tax is computed				

NOTE: If exemption is claimed with respect to any gross receipts, submit herein or by separate schedule, sufficient and detailed information to substantiate such claim.

.....

.....

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5. Safe deposit and trust companies subject to tax imposed under Art. 81, Sec. 95:
Estimated amount of property held in trust: Real $.....; Personal $.....
Itemization of gross receipts and apportionment to Maryland:

Class of Receipt	Gross Receipts from all sources	Gross Receipts from all sources in Maryland
Safe deposit business		
Trust business, including business of acting in a fiduciary or representative capacity		
Total		

6. Reference to legislative acts imposing gross receipts tax on companies other than those classified in Items 4 and 5:
Chapter..... Acts.....
Itemization of gross receipts and apportionment to Maryland:

Class of Receipt	Gross Receipts from all sources	Gross Receipts from all sources in Maryland
Total		

7. Affidavit: E. T. Steffy, General Auditor (Signature and Official Title) (Corporate Seal)

STATE OF MARYLAND City of Baltimore, to wit:

On this 29th day of August 1947 before me, the subscriber, a Notary Public of the State and City aforesaid, personally appeared E. T. Steffy the General Auditor of the within named corporation and made oath in due form of law that the statements contained in this report are true and correct to the best of his knowledge and belief.

As witness my hand and Notarial Seal Leonard W. Bair (Notary Public) (Notarial Seal)
My Commission Expires May 2, 1949

Computation of tax by State Tax Commission of Maryland

Amount on which State Tax is computed	State Tax on Gross Receipts	
	Rate	Amount
$	½%	$
	1%	
	1¼%	
	1½%	
	2%	
	2½%	
$	Total	$

Report examination made:

Date ..... By .....
Date of notification of assessment .....

Date assessment entered .....

Approval of Commissioners:

(a) .....

(b) .....

(c) .....

[fol. 10] WESTERN MARYLAND RAILWAY COMPANY

Amended—Schedule 1

Gross Receipts Tax Report
State of Maryland

Mileage—December 31, 1945

All track mileage	System	Maryland	%
	1,376.33	548.76	39.8713
Gross Receipts per Schedule 2			$30,650,914.16
Apportioned to Maryland at 39.8713			$12,220,917.94

[fol. 11] WESTERN MARYLAND RAILWAY COMPANY

Amended—Schedule 2

Statement of Total Taxable Receipts Apportionable to Statute for Year 1945

Freight Revenue per Annual Report	$32,653,479.70	
Passenger Revenue per Annual Report	515,051.20	$33,168,530.90
Less—		
Towing	280,886.01	
Trackage Tolls	25,481.50	306,367.51
		$32,862,163.39
*Less—Export and Import Traffic		
(1) Coal	578,474.45	
(2) Ores	437,450.66	
(2) Miscellaneous Freight	819,503.02	
(3) Grain	669,894.45	2,505,322.58
Taxable Freight and Passenger Revenue		$30,356,840.81
Excess Baggage	259.07	
Mail	50,952.04	
Express	28,714.66	
Other Passenger Train	1,979.81	
Milk	1,286.34	
Switching	128,443.08	211,635.00
Station and Train Privileges	1,654.48	
Parcel Room	3.10	
Demurrage	78,946.58	
Detouring and use of Tracks	1,834.19	82,438.35
		$30,650,914.16

* (1) Computed from total tons of bunker and export coal and average Western Maryland Revenue on such coal.
(2) Computed from total tons of export and import traffic and average Western Maryland revenue for each class of traffic.
(3) Total gross revenues from grain.

[fol. 12] WESTERN MARYLAND RAILWAY COMPANY

Gross Receipts Tax Assessments for 1945, 1946 and 1947; Assessments after Deduction of Export and Import Receipts; and Difference between the Two Assessments

	1945			1946			1947		
	Gross Receipts	Rate	Tax	Gross Receipts	Rate	Tax	Gross Receipts	Rate	Tax
	$ 548,940.00	1¼%	6,856.12	$ 548,760.00	1¼%	$ 6,859.50	$ 550,030.00	1¼%	$ 6,875.38
Gross Receipts	548,940.00	2%	10,969.80	548,760.00	2%	10,975.20	550,030.00	2%	11,000.60
Tax Assessed	13,146,939.34	2½%	328,673.48	12,122,302.62	2½%	303,057.56	11,222,757.41	2½%	280,568.93
	$14,243,919.34		$346,499.40	$13,219,822.62		$320,892.26	$12,322,817.41		$298,444.91
Export & Import	548,490.00	1¼%	6,856.12	548,760.00	1¼%	6,859.50	550,030.00	1¼%	6,875.38
Receipts De-	548,890.00	2%	10,969.80	548,760.00	2%	10,975.20	550,030.00	2%	11,000.60
ducted	12,469,504.87	2½%	311,737.62	11,123,397.94	2½%	278,084.94	9,063,133.37	2½%	226,578.33
	$13,566,484.87		$329,563.54	$12,220,917.94		$295,919.64	$10,163,193.37		$244,454.31
Difference			16,935.86			$24,972.62			$53,990.60

[fol. 13] OPINION OF ATTORNEY GENERAL OF MARYLAND

THE STATE LAW DEPARTMENT

1901 Baltimore Trust Building

Baltimore, Maryland

November 21, 1947

State Tax Commission
Davison Building
Baltimore 1, Maryland

Gentlemen:—

Several railroads subject to the franchise tax levied by Sections 94½ to 99 of Article 81 have seized upon two recent decisions of the Supreme Court of the United States to assert that the Import-Export Clause of the Federal Constitution (Article I, Section 10, Clause 2) renders it unconstitutional for the State of Maryland to include in the measurement of said tax, receipts derived from the transportation of goods destined for exportation or consigned from importation. The two recent decisions upon which these railroads particularly rely are *Richfield Oil Corp.* v. *State Board of Equalization*, 1946, 329 U. S. 69, 91 L. ed. 123, and *Joseph* v. *Carter & Weekes Stevedoring Company*, 1947, 330 U. S. 422, 91 L. ed. 720. These decisions are elaborately discussed by Professor Thomas Reed Powell in "More Ado about Gross Receipts Taxes", appearing in 60 Harv. L. Rev. 501 and 710, at pp. 713 and 743.

The Richfield Oil Case involved the validity under the Import-Export Clause of the California Retail Sales Tax as applied to a sale for export. The California statute imposed upon the vendor, Richfield Oil Corporation, the duty of collecting the tax for the State from each vendee. The vendee in this case was the New Zealand government which purchased oil for delivery "to the order of the Naval Secretary, Naval Office, Wellington, into N. Z. Naval tank steamer R. F. A. Nucula at Los Angeles, California". Richfield Oil Corporation carried the oil by pipe line from its refinery in California to storage tanks at the harbor from which tanks the oil was pumped into the steamer Nucula. The Supreme Court held that the Import-Export Clause

prohibited the imposition of the California Sales Tax upon this sale. Mr. Justice Douglas wrote the opinion in which six justices concurred. Mr. Justice Black filed a dissenting opinion. Mr. Justice Murphy took no part in the case. Mr. Justice Douglas discussed the Commerce and Import-Export Clauses at some length and concluded that while the Commerce Clause permits a State tax which is not discriminatory, the Import-Export Clause prohibits "any" State tax regardless of whether that tax is discriminatory:

> "It seems clear that we cannot write any such qualification into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws'. The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a [fol. 14] substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax."

Mr. Justice Douglas then turned to the question of whether at the time the tax accrued the oil was an export. Since the oil was delivered into the hold of the vessel from the vendor's tanks and since "that delivery marked the commencement of the movement of the oil abroad", he concluded that the commencement of the export would occur no later than the delivery of the oil into the vessel. He further decided that the Sales Tax in question was an impost upon an export even though under California law the tax was an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales and not a tax upon the consumer or upon the goods sold:

> "Appellee concedes that the prohibition of the Import-Export Clause would be violated if the goods were taxed as exports or because of their exportation, or if the process of exportation were itself taxed. We perceive, however, no difference in substance between any tax so labeled and the present tax. * * * The incident which gave rise to the accrual of the tax was a step in the export process."

The Joseph case involved the validity of the New York City gross receipts derived from stevedoring. The stevedoring company was engaged in loading and unloading vessels carrying goods in interstate and foreign commerce. The Supreme Court in a five to four decision held that the Commerce Clause prohibited such an unapportioned tax on the gross proceeds from interstate business, where the taxes were not in lieu of ad valorem taxes on property. The majority of the Court after noting that "on precedent, the *Puget Sound* case (*Puget Sound Stevedoring Co.* v. *State Tax Commission*, 1937, 302 U. S. 90, 82 L. ed. 68) is controlling", held:

> "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company."

Mr. Justice Black and Mr. Justice Murphy dissented. Mr. Justice Douglas wrote an opinion, in which Mr. Justice Rutledge concurred, dissenting in part. In his dissent, Mr. Justice Douglas stated it to be his opinion that a State tax upon the gross receipts from stevedoring does not violate the Commerce Clause but that such a tax as applied to gross receipts from loading and unloading ships engaged in foreign commerce is prohibited by the Import-Export Clause.

The Maryland gross receipts tax levied by Sections 94½ to 99 of Article 81 is a franchise tax upon railroads and certain other public utilities for the privilege of doing business each year "measured by the gross receipts for the preceding calendar year". Taxable gross receipts are limited to operating revenues coming from business in this State. Where actual receipts from business in this State [fol. 15] are not known, a reasonable and fair method of apportionment is used. The tax is in lieu of property taxes on operating property and in lieu of income taxes (operating revenues subject to the tax are excluded from gross income).

The Maryland gross receipts tax has been in effect since 1872. It has never been passed upon by the Supreme Court

of the United States, but the Court of Appeals of this State, in reliance upon the *State Tax on Railway Gross Receipts (Philadelphia & Reading Rd. Co. v. Pennsylvania)*, 1873, 15 Wall. 284, 21 L. ed. 164 and *Maine v. The Grand Trunk Railway Company*, 1891, 142 U. S. 217, 35 L. ed. 994, has held that the Maryland tax does not violate the Commerce Clause of the Federal Constitution. See *The Cumberland & Pennsylvania Railroad Co. v. State*, 1901, 92 Md. 668, wherein the Court of Appeals, after discussing the decisions of the Supreme Court of the United States at length, held (p. 691):

> "But understanding the *Maine* case as we do, and being profoundly impressed with the absolute soundness of the principles announced in the Gross Receipts case, and approved in the Maine case, we are bound, in duty to the State, to uphold the tax in question, leaving it to the Supreme Court to say if invoked, whether we have misinterpreted their meaning."

The Court of Appeals reaffirmed its opinion that the Maryland gross receipts tax does not violate the Commerce Clause in *The Postal Telegraph Cable Co. v. County Commissioners*, 1917, 131 Md. 96, 103.

As previously stated, the present attack upon the tax is that it violates the Import-Export Clause. We, therefore, will not concern ourselves in this opinion with the Commerce Clause.

The Import-Export Clause reads as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws. * * * "

Most of the judicial decisions interpreting this Clause have been concerned with when the import process ends or when the export process begins. Imposts or duties levied before the import process ends or after the export process begins have consistently been held unconstitutional. It is now well established that the import process continues until the goods are sold or unpacked. *Brown v. Maryland*, 1827, 12 Wheat. 439, 6 L. ed. 678; *Hooven & Allison Co. v. Evatt*, 1945, 324, U. S. 652; 89 L. ed. 1252. It is equally well estab-

lished that the export process begins when goods are delivered to a common carrier for transshipment overseas. *Coe v. Erroll*, 1886, 116 U. S. 517 29 L. ed. 715; *Railroad Commission* v. *Texas & Pacific Ry. Co.*, 1939, 229 U. S. 336, 57 L. ed. 1215. Thus it must be conceded that goods in transit through Maryland from or to foreign points are immune from taxation by this State if in the case of imports the goods are not sold or the original package broken and [fol. 16] if in the case of exports the transportation is not interrupted except as may be necessary for transshipment. Undoubtedly, a sizeable portion of the traffic carried by railroads paying the Maryland gross receipts tax is so immune from taxation by this State.

The question remains as to whether the franchise tax required to be paid by railroads measured by their gross receipts for the preceding year is an impost or duty on the goods being carried, and we are of the opinion that this question should be answered in the negative. Generally speaking, if the tax is not laid on the articles themselves while in course of importation or exportation, the test of the validity of the tax is whether it "so directly and closely" bears on the process of importing or exporting as to be in substance a tax on the importation or exportation. See *Thames & Mersey Marine Insurance Co.* v. *United States*, 1915, 237 U. S. 19, 25, 59 L. ed. 812; Cooley, "The Law of Taxation" (1924 Edition, Vol. I, Sec. 112). Otherwise, every tax which in some way affects the price of an import or export would be an unconstitutional impost or duty; property taxes, income taxes, sales taxes and all taxes paid by railroads would be unconstitutional because they each directly affect the cost of transportation and thereby indirectly affect the goods transported.

The only judicial decision to our knowledge which is directly in point is the case of *Inter-Island Steam Navigation Company* v. *Territory of Hawaii*, 1938, C. C. A. 9, 96 F. 2d 412, which involved a public utility tax equal to one-twentieth (1/20) of one percent of the gross income during the preceding year plus one-fiftieth (1/50) of one percent of the par value of the utility's outstanding stock. The purpose of this tax was to pay the cost of regulation. The utility involved in this case was a steamship company, which asserted, among other objections to the tax, that it violated

the Import-Export Clause. The Circuit Court of Appeals of the United States for the Ninth Circuit held that the tax had too remote and indirect an effect upon imports and exports to be an unconstitutional impost or duty. The Court said: (p. 419)

> "It is next contended that the fees are an unconstitutional burden on imports and exports. Article I, Section 9, of the Constitution, provides that: 'No tax or duty shall be laid on Articles exported from any State.' Article I, Section 10, provides: 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws'. Appellant says that these clauses 'forbid not only property taxes but any fees, charges or occupation taxes which in substance and effect burden imports or exports.' See *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, 227, 53 S. Ct. 373, 375, 77 L. ed. 710. Assuming, without deciding, that the clauses are applicable to a Territory, we think that such a rule has no application here. The fees are not laid on the property imported or exported, on the proceeds thereof, or on the privilege of importing or exporting. The fact that appellant must pay a fee based on receipts from transporting articles imported and exported by others, has only an indirect and remote effect, if any on the imports and exports."

[fol. 17] This decision of the Circuit Court of Appeals was affirmed by the Supreme Court of the United States in an opinion reported at 305 U. S. 306, 83 L. ed. 189. Apparently, the Import-Export Clause argument was not pursued in the Supreme Court because Mr. Justice Black in sustaining the constitutionality of the tax discussed only the Commerce Clause.

In a number of cases the Supreme Court has sustained a tax which affects imports or exports as directly as does the Maryland gross receipts tax on railroads. An ad valorem property tax upon vessels engaged in foreign trade has consistently been sustained in spite of the fact that it affects imports and exports as directly, or more so, than the Maryland tax upon railroads. *The Wheeling, Parkersburg &*

Cincinnati Transportation Co. v. *Wheeling*, 1879, 98, U. S. 273, 25 L. ed. 412; *Southern Pacific Company* v. *Kentucky*, 1908, 222 U. S. 63, 56 L. ed. 96. In *New York* v. *Wells*, 1908, 208 U. S. 14, 52 L. ed. 370, the Court sustained the assessment against an importer of a franchise tax on capital employed in the business where such capital included cash in hand or in bank and the amount receivable upon bills and accounts payable, although such cash and receivables resulted from sales of imported goods in the original package. In *Peck & Co.* v. *Lowe*, 1918, 247 U. S. 165, 62 L. ed. 1049, the Court sustained the levying of the federal income tax upon income earned by a domestic corporation from shipping goods to foreign countries. The Court pointed out (247 &. S. 173) that "at most, exportation is affected only indirectly and remotely". In *Matson Navigation Co.* v. *State Board*, 1936, 297 U. S. 411, 80 L. ed. 791, the Supreme Court unanimously sustained a California franchise tax computed at the rate of four percent (4%) of net income for the preceding year. The taxpayer was a steamship company engaged in intrastate, interstate and foreign commerce. The tax commissioner attributed to California 22.2% of the Company's net income from interstate and foreign commerce and included that amount in the computation of the tax. The Import-Export Clause was not expressly raised in the *Matson* case probably because of *Peck & Co.* v. *Lowe*, *supra*, in which the Court had sustained the levy of the federal income tax upon a person in the export business.

While the taxes and the situations involved in the *Wheeling*, *Wells*, *Peck* and *Matson* cases may be distinguished from the Maryland gross receipts tax upon railroads, these decisions furnish examples of a tax being sustained in spite of the fact that it indirectly affects imports and exports. We believe that the Maryland tax is in the same category.

We are unable to agree with counsel for the railroads that the Supreme Court by its decisions in the *Richfield Oil* and *Joseph* cases has indicated that a gross receipts tax such as the Maryland tax is unconstitutional under the Import-Export Clause. The *Richfield Oil* case was a sales tax case and the tax was in substance a direct tax on the article imported. While the *Joseph* case involved a gross receipts tax, it was decided under the Commerce Clause. Counsel for the railroads argue that because the five justices

who formed the majority opinion in the *Joseph* case concurred with the Import-Export opinion of Messrs. Justice Douglas and Rutledge in the *Richfield Oil* case, the *Joseph* case should be regarded in effect as a seven to two decision invalidating a gross receipts tax under the Import-Export Clause. It may be argued with greater force that the failure of Mr. Justice Douglas' Import-Export argument to prevail [fol.18] in the *Joseph* case, demonstrates that majority of the Court is of the opinion that such a gross receipts tax does not violate that clause of the Constitution.

Until the Supreme Court indicates with certainty that the Import-Export Clause prohibits a State to include in the admeasurement of a franchise tax measured by gross receipts, revenues from the transportation of goods in the process of importation or exportation, it is our duty to advise you that the Maryland tax as presently assessed is constitutional. We fully accord with Professor Powell's warning that "would-be prophets must remember, however, that in addition to logic, judgment and principle they must reckon with personalities". 60 Harv. L. Rev. 749. Nevertheless, we are of the opinion that should the railroads see fit to pursue this question to the Supreme Court, the State will prevail and your present method of assessing the tax will be sustained.

Very truly yours, (S) Hall Hammond, Attorney General; Richard W. Emory, Deputy Attorney General.

HH:LEL
RWE

WESTERN MARYLAND RAILWAY COMPANY

Standard Oil Building

Eugene S. Williams, Vice President and General Counsel

Baltimore 2, Md., December 31, 1947.

State Tax Commission of Maryland
Davison Building
Baltimore 2, Maryland

Gentlemen:—

Western Maryland Railway Company desires to amend its protest dated March 23, 1946 of the tentative assessment of gross receipts taxes made against it for the year 1946 as set forth in your notice dated March 21, 1946, and protests also the failure of the Commission to assess the tax in accordance with the amended return filed by protestant for the year ended December 31, 1945, so that its protest will state the following grounds in place of those stated in its previous protest.

This tentative assessment includes gross receipts of $2,505,322.58 earned by protestant from the transportation of freight in the process of importation into and exportation out of the United States, resulting in proposed gross receipts taxes of $24,938.80 more than are properly payable. Such gross receipts are not taxable in the State of Maryland because Article I, Section 10, Clause 2 of the Constitution of the United States forbids taxation by any state of imports and exports, and the taxes upon the earnings above specified are within this constitutional prohibition. Taxation of the gross receipts aforesaid is also forbidden by the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States.

Western Maryland Railway Company, therefore, requests it be accorded a hearing on this protest to the end that the gross receipts and the taxes thereon which are stated herein may be eliminated from the assessment for the reasons which have been set forth.

Very truly yours, Western Maryland Railway Company, By (S) Eugene S. Williams, Vice President.

[fol. 20] WESTERN MARYLAND RAILWAY COMPANY

Law Department

Standard Oil Building

Baltimore 2, Maryland

February 27, 1948

Mr. Albert W. Ward, Secretary
State Tax Commission of Maryland
Davison Building
Baltimore 1, Maryland

Dear Mr. Ward:—

At the argument yesterday on the import-export gross receipts question, the Commission asked for figures showing in terms of percentage the relationship of coal and other commodities as shown on Exhibit 1 to the total import-export traffic. I give these figures below for each of the years 1946 and 1947 based of course on the traffic for the preceding years of 1945 and 1946:

	1945	1946
Coal	19.5%	59.6%
Ore	23.7%	16.2%
Grain	30.0%	15.1%
Miscellaneous Freight	26.8%	9.1%

By referring to Exhibit 1 you will see that in 1945 the tonnages of all classes were smaller, this, of course, being a war year. Coal did not become a large item of export until 1946.

I trust that the foregoing will furnish the information which the Commission desires.

Very truly yours, (S) William C. Purnell, General Counsel.

WCP:1

[fol. 21] FINAL NOTICE OF ASSESSMENT

STATE TAX COMMISSION OF MARYLAND

Union Trust Building

Baltimore

March 24, 1948.

To: Western Maryland Railway Company
401 Standard Oil Building
Baltimore 2, Maryland

This is to notify you that the Commission has reviewed its 1946 tentative assessment in respect to your written application for a change therein, *and has entered a final assessment as set forth below.* Should you desire to further challenge the amount or validity of the assessment, you have a right under the law to appeal to the Courts within thirty (30) days from the date of this notice.

In the event of an appeal to the Courts, such appeal does not operate to stay the collection of the tax, with any interest or penalties that may accrue; but upon final determination of any such appeal, the taxpayer is entitled to a refund with interest of any money paid in excess of the amount properly chargeable under such determination.

State Tax Commission of Maryland, Albert W. Ward, Secretary; by Harry H. Blackstone.

Amount of which State Tax is computed	Rate	Amount
$548,760.00	1¼%	$6,859.50
548,760.00	2%	10,975.20
12,122,302.62	2½%	303,057.56
$13,219,822.62		$320,892.26

[fol. 22] BEFORE STATE TAX COMMISSION OF MARYLAND

REQUESTS FOR RULINGS 1946 GROSS RECEIPTS TAX APPEAL

1. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year

1945 from the transportation of exported coal was $563,712.03.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

2. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1945 from the transportation of exported grain was $628,360.99.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

3. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1945 from the transportation of exported freight of miscellaneous types was $854,581.96.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

4. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1945 from the transportation of imported ores was $529,227.42.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

[fol. 23] 5. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1945 from the transportation of imported freight of miscellaneous types was $34,918.28.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

6. Western Maryland Railway Company requests the Commission to rule as a matter of law that the tax imposed for the calendar year 1946 by Article 81, Section 95(a) of the Annotated Code of Maryland upon its gross receipts for the calendar year 1945, may not be imposed upon so much of taxpayer's gross receipts for the said calendar year 1945 as were derived from the transportation of imported and exported freight because to do so would be to impose a State tax which is prohibited by Article 1, Section 10, Clause 2 of the Constitution of the United States.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

7. Western Maryland Railway Company requests the Commission to rule as a matter of law that the tax imposed for the calendar year 1946 by Article 81, Section 95(a) of the Annotated Code of Maryland upon its gross receipts for the calendar year 1945, may not include that portion of taxpayer's gross receipts for the said calendar year 1945 which were derived from the transportation of exported and imported freight because to do so would violate Article 81, Section 8, Clause 3 of the Constitution of the United States.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

[fol. 24] BEFORE THE STATE TAX COMMISSION OF MARYLAND

In the Matter of THE WESTERN MARYLAND RAILWAY COMPANY

OPINION AND ORDER OF THE COMMISSION

This case is a protest against the inclusion in the measurement of The Western Maryland Railway Company's gross receipts taxes for the years 1946 and 1947 of receipts derived from the transportation of goods consigned from importation or destined for exportation on the ground that the tax so assessed violates the Import-Export Clause of the Federal Constitution.

The protestant has introduced evidence of its system of accounts by which it reports receipts from the transportation of certain types of freight which were in the process of being imported or exported, as follows:

	1945 (1946 tax)	1946 (1947 tax)
Transportation of exported coal	$563,712.03	$3,106,802.59
Transportation of exported grain	628,360.99	736,511.24
Transportation of other exported freight	854,581.96	347,557.43
Transportation of imported ores	529,227.42	804,008.16
Transportation of other imported freight	34,918.28	154,560.00
Total	$2,610,800.68	$5,149,439.42

Since we view the case as presenting solely a question of constitutional law, we see no reason to pass on the accuracy of these figures and the system of accounts by which they are derived.

The Attorney General of the State, under date of November 21, 1947, wrote an exhaustive opinion on the constitutional question raised by this protest. A copy of this opinion [fol. 25] was furnished to the protestant prior to the hearing in this case. We concur in the reasoning and conclusion of the Attorney General and, therefore, rule that protestant's gross receipts taxes for the years 1946 and 1947 as assessed are constitutional.

The protestant's requests for rulings are denied and the protests are disallowed.

(S) Joseph H. A. Rogan, Owen E. Hitchins, William W. Travers, Constituting the State Tax Commission of Maryland.

Dated: March 24, 1948.

[fols. 26-27] Secretary's certificate to foregoing transcript omitted in printing.

[Here follow 2 Photolithographs, side folios 28, 28a.]

24A

Form No. 11-24

Report Received by Commission
Date Mar. 17, 1947

STATE TAX COMMISSION OF MARYLAND
Union Trust Building
Baltimore-1, Maryland

1947

GROSS RECEIPTS TAX REPORT FOR THE YEAR ENDED DECEMBER 31, 1946
(File this report on or before March 15 following close of year.)

1. Name of Taxpayer: Western Maryland Railway Company

2. Mailing address: 401 Standard Oil Building, Baltimore 2, Maryland

3. State and year of incorporation (if incorporated): Maryland and Pennsylvania-February 15, 1917

4. Taxpayers subject to tax imposed under Art. 81, Sec. 95:

Business Classification	Total System Mileage	Total Maryland Mileage	% Total Mileage located in Maryland	Allocation Ratio
Railroad worked by steam				All track mileage
Telegraph or cable				Wire mileage
Express or transportation	See Schedule 1			Car mileage
Parlor and sleeping car				Car mileage
Telephone				Wire mileage
Oil pipe line				Pipe line mileage
Electric light and power				
Gas				
Safe deposit and trust (itemize under Item 5)				

NOTE: Any allocation factors, other than those above specified, shall be used subject to approval by the Commission.

Itemization of gross receipts, and apportionment to Maryland:

Class of Receipt	Gross Receipts from all Sources		Non-Operating Receipts from all Sources	
	System	Apportioned to Maryland	System	Apportioned to Maryland
	See Schedule 2			
Total				

Total Gross Receipts apportioned to Maryland	
Deduct — Non-Operating Receipts apportioned to Maryland	
Assessable Receipts apportioned to Maryland	
Deduct — Assessable Receipts on which exemption is claimed	
Amount on which State Tax is computed	

NOTE: If exemption is claimed with respect to any gross receipts, submit herein or by separate schedule, sufficient and detailed information to substantiate such claim;

5. Safe deposit and trust companies subject to tax imposed under Art. 81, Sec. 95:
Estimated amount of property held in trust: Real $..... ; Personal $.....
Itemization of gross receipts and apportionment to Maryland:

Class of Receipt	Gross Receipts from all sources	Gross Receipts from all sources in Maryland
Safe deposit business		
Trust business, including business of acting in a fiduciary or representative capacity		
Total		

6. Reference to legislative acts imposing gross receipts tax on companies other than those classified in Items 4 and 5:
Chapter..... Acts.....
Itemization of gross receipts and apportionment to Maryland:

Class of Receipt	Gross Receipts from all sources	Gross Receipts from all sources in Maryland
Total		

7. Affidavit: E. T. STEFFY, General Auditor (Signature and Official Title) (Corporate Seal)

STATE OF MARYLAND City of Baltimore, to wit:

On this 11th day of March 194 7 before me, the subscriber, a Notary Public of the State and City aforesaid, personally appeared E. T. Steffy the General Auditor of the within named corporation and made oath in due form of law that the statements contained in this report are true and correct to the best of his knowledge and belief.

As witness my hand and Notarial Seal Catherine E. Krimm (Notary Public) (Notarial Seal)

Computation of tax by State Tax Commission of Maryland

Amount on which State Tax is computed	State Tax on Gross Receipts	
	Rate	Amount
$	½%	$
	1%	
550,030	1¼%	6,875 38
	1½%	
550,030	2%	11,000 60
11,222,757 41	2½%	280,568 93
$ 12,322,817 41	Total	$ 298,444 91

Report examination made: March 29, 1948

Date 4/30/49 By H. H. B.

Date of notification of assessment

Date assessment entered

Approval of Commissioners:

(a) (S) JOS. H. A. ROGAN

(b) (S) OWEN E. HITCHINS

(c)

[fol. 29] WESTERN MARYLAND RAILWAY COMPANY

Schedule 1

Gross Receipts Tax Report
State of Maryland

Mileage—December 31, 1946

Length of line per statute (main track mileage)—

System	Maryland	%
832.98	268.75	32.2637

Gross Receipts per Schedule 2	$30,844,132.74
Apportioned to Maryland at 32.2627.	9,951,458.45

Per request of State Tax Commission (all track mileage)—

System	Maryland	%
1,376.73	550.03	39.9519

[fol. 30] WESTERN MARYLAND RAILWAY COMPANY

Schedule 2

Statement of Total Taxable Receipts Apportionable to Statute for Year 1946

Freight Revenue per Annual Report	$30,401,318.53	
Passenger Revenue per Annual Report	365,951.11	$30,767,299.64
Less—		
Towing	207,360.93	
Trackage Tolls	29,043.00	236,403.93
Taxable Freight and Passenger Revenue		$30,530,895.71
Excess Baggage	137.41	
Mail	58,427.03	
Express	4,020.92	
Other Passenger Train	4,567.55	
Milk	822.37	
Switching	134,035.21	202,010.49
Station and Train Privileges	1,485.89	
Parcel Room Receipts	4.60	
Demurrage	107,726.55	
Detouring and use of Tracks	2,009.50	111,226.54
		$30,844,132.74

[fol. 31] WESTERN MARYLAND RAILWAY COMPANY

Schedule 3

Statement of Non-Operating Receipts for Year 1946

		System	Maryland
Storage Freight—			
New Pier Revenue	$86,945.23		
Other Freight	2,726.81	$89,672.04	$87,759.08
Storage—Baggage		46.15	34.10
Grain Elevator		452,023.83	452,023.83
Rent of Buildings and Other Property		48,947.36	44,784.36
New Pier Revenue		390,248.14	390,248.14
Miscellaneous		9,317.67	3,680.05
		$990,255.19	$978,529.56

[Here follow 2 Photolithographs, side folios 32, 32a.]

Form No. 11 - 4

Report Received by Commission

Date.....

STATE TAX COMMISSION OF MARYLAND
Union Trust Building
Baltimore-1, Maryland

1947

AMENDED

GROSS RECEIPTS TAX REPORT FOR THE YEAR ENDED DECEMBER 31, 1946

(File this report on or before March 15 following close of year.)

1. Name of Taxpayer ..... **Western Maryland Railway Company**

2. Mailing address ..... **401 Standard Oil Building, Baltimore -2, Maryland.**

3. State and year of incorporation (if incorporated) ..... **Maryland and Pennsylvania - February 15, 1917**

4. Taxpayers subject to tax imposed under Art. 81, Sec. 95:

Business Classification	Total System Mileage	Total Maryland Mileage	% Total Mileage located in Maryland	Allocation Ratio
Railroad worked by steam				All track mileage
Telegraph or cable				Wire mileage
Express or transportation	**See Amended Schedule 1**			Car mileage
Parlor and sleeping car				Car mileage
Telephone				Wire mileage
Oil pipe line				Pipe line mileage
Electric light and power				
Gas				
Safe deposit and trust (itemize under Item 5)				

Note: Any allocation factors, other than those above specified, shall be used subject to approval by the Commission.

Itemization of gross receipts, and apportionment to Maryland:

Class of Receipt	Gross Receipts from all Sources		Non-Operating Receipts from all Sources	
	System	Apportioned to Maryland	System	Apportioned to Maryland
	See Amended Schedule 2			
Total				
Total Gross Receipts apportioned to Maryland				
Deduct — Non-Operating Receipts apportioned to Maryland				

5. Safe deposit and trust companies subject to tax imposed under Art. 81, Sec. 95:
Estimated amount of property held in trust: Real $; Personal $
Itemization of gross receipts and apportionment to Maryland:

Class of Receipt	Gross Receipts from all sources	Gross Receipts from all sources in Maryland
Safe deposit business		
Trust business, including business of acting in a fiduciary or representative capacity		
Total		

6. Reference to legislative acts imposing gross receipts tax on companies other than those classified in Items 4 and 5:
Chapter Acts
Itemization of gross receipts and apportionment to Maryland:

Class of Receipt	Gross Receipts from all sources	Gross Receipts from all sources in Maryland
Total		

7. Affidavit: E. T. Steffy, General Auditor (Signature and Official Title) (Corporate Seal)

STATE OF MARYLAND, to wit:

On 29th day of August 194 , before me, the subscriber, a Notary Public of the State and City aforesaid, personally appeared E. T. Steffy the General Auditor of the within named corporation and made oath in due form of law that the statements contained in this report are true and correct to the best of his knowledge and belief.

As witness my hand and Notarial Seal Leonard W. Bair (Notary Public) (Notarial Seal)
My Commission expires May 2, 1949 (Seal)

Computation of tax by State Tax Commission of Maryland

Amount on which State Tax is computed	State Tax on Gross Receipts	
	Rate	Amount
$	½%	$
	1%	
	1¼%	
	1½%	
	2%	
	2½%	
$	Total	$

Report examination made: Approval of Commissioners:

Date By

[fol. 33] WESTERN MARYLAND RAILWAY COMPANY

Amended—Schedule 1

Gross Receipts Tax Report
State of Maryland

Mileage—December 31, 1946

All track mileage—	System	Maryland	%
	1,376.73	550.03	39.9519

Gross Receipts per Schedule 2	$25,438,573.39
Apportioned to Maryland @ 39.9519	$10,163,193.37

[fol. 34] WESTERN MARYLAND RAILWAY COMPANY

Amended—Schedule 2

Statement of Total Taxable Receipts Apportionable to Statute for Year 1946

Freight Revenue per Annual Report	$30,401,348.58	
Passenger Revenue per Annual Report	365,951.11	$30,767,299.64
Less—		
Towing	207,360.93	
Trackage Tolls	29,043.00	236,403.93
		$30,530,895.71
*Less—Export and Import Traffic—		
(1) Coal	3,495,404.53	
(2) Ores	653,505.16	
(2) Miscellaneous Freight	493,959.70	
(3) Grain	762,691.00	$5,405,559.44
Taxable Freight and Passenger Revenue		$25,125,336.27
Excess Baggage	137.41	
Mail	58,427.03	
Express	4,020.92	
Other Passenger Train	4,567.55	
Milk	822.37	
Switching	134,035.21	202,010.49
Station and Train Privileges	1,485.89	
Parcel Room Receipts	4.60	
Demurrage	107,726.55	
Detouring and use of Tracks	2,009.50	111,226.54
		$25,438,573.30

* (1) Computed from total tons of bunker and export coal and average Western Maryland revenue on such coal.
(2) Computed from total tons of export and import traffic and average Western Maryland revenue for each class of traffic.
(3) Total gross revenues from grain.

[fol. 35] WESTERN MARYLAND RAILWAY COMPANY

Gross Receipts Tax Assessments for 1945, 1946 and 1947; Assessments after Deduction of Export and Import Receipts; and Difference between the Two Assessments

Omitted. Printed side page. 12 ante

[fols. 36-37] Letter of Sept. 2, 1947

Omitted. Printed side page. 7 ante

[fols. 38-43] Opinion of Attorney General of Maryland

Omitted. Printed side page. 13 ante

[fol. 44] NOTICE OF TENTATIVE ASSESSMENT

Miscellaneous

STATE TAX COMMISSION OF MARYLAND
504 Union Trust Building
Baltimore, Md.

Gross Receipts

December 18, 1947.

To the Western Maryland Railway Company
401 Standard Oil Building
Baltimore 2, Maryland

This is to notify you that a tentative assessment has been entered against your corporation for the current year as set forth below, and that the same will become *final and conclusive* unless written application for a change therein shall be presented to the Commission within *fifteen* (15) *days* from the date of this notice.

State Tax Commission of Maryland, Albert W. Ward, Secretary; Per Henri E. Reinhard.

Amount on which State Tax is computed	Rate	Amount
$ 550,030.00	1¼%	$ 6,875.38
550,030.00	2%	11,000.60
11,222,757.41	2½%	280,568.93
$12,322,817.41		$298,444.91

[fol. 45] PROTEST

WESTERN MARYLAND RAILWAY COMPANY

Law Department

Standard Oil Building

Baltimore 2, Md., December 31, 1947.

State Tax Commission of Maryland
Davison Building
Baltimore 2, Maryland

Gentlemen:—

Western Maryland Railway Company protests the tentative assessment of gross receipts taxes made against it for the year 1947 as set forth in your notice dated December 18, 1947, and protests also the failure of the Commission to assess the tax in accordance with the amended return filed by protestant for the year ended December 31, 1946, for the following reasons:

This tentative assessment includes gross receipts of $2,159,623.70 earned by protestant from the transportation of freight in the process of importation into and exportation out of the United States, resulting in proposed gross receipts taxes of $53,990.59 more than are properly payable. Such gross receipts are not taxable by the State of Maryland because Article I, Section 10, Clause 2 of the Constitution of the United States forbids taxation by any state of imports and exports, and the taxes upon the earnings above specified are within this constitutional prohibition. Taxation of the gross receipts aforesaid is also forbidden by the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States.

Western Maryland Railway Company, therefore, requests it be accorded a hearing on this protest to the end that the gross receipts and the taxes thereon which are stated herein may be eliminated from the assessment for the reasons which have been set forth.

Very truly yours, Western Maryland Railway Company, by: (S) Eugene S. Williams, Vice President.

[fol. 46] Letter of Feb. 27, 1948

Omitted. Printed side page. 20 ante

[fol. 47] FINAL NOTICE OF ASSESSMENT

STATE TAX COMMISSION OF MARYLAND

Union Trust Building

Baltimore

March 24, 1948.

To Western Maryland Railway Company
401 Standard Oil Building
Baltimore 2, Maryland

This is to notify you that the Commission has reviewed its 1947 tentative assessment in respect to your written application for a change therein, *and has entered a final assessment as set forth below.* Should you desire to further challenge the amount or validity of the assessment, you have a right under the law to appeal to the Courts within thirty (30) days from the date of this notice.

In the event of an appeal to the Courts, such appeal does not operate to stay the collection of the tax, with any interest or penalties that may accrue; but upon final determination of an such appeal, the taxpayer is entitled to a refund with interest of any money paid in excess of the amount properly chargeable under such determination.

State Tax Commission of Maryland, Albert W. Ward, Secretary; by: Harry H. Blackstone.

Amount on which State Tax is computed	Rate	Amount
$ 550,030.00	1¼%	$ 6,875.38
550,030.00	2%	11,000.60
11,222,757.41	2½%	280,568.93
$12,322,817.41		$298,444.91

[fol. 48] BEFORE STATE TAX COMMISSION OF MARYLAND

REQUESTS FOR RULINGS 1947 GROSS RECEIPTS TAX APPEAL

1. (Revised) Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1946 from the transportation of exported coal was $3,106,802.59.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

2. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1946 from the transportation of exported grain was $736,511.24.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

3. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1946 from the transportation of exported freight of miscellaneous types was $347,557.43.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

4. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1946 from the transportation of imported ores was $804,008.16.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

[fol. 49]

5. Western Maryland Railway Company requests the Commission to find as a matter of fact that the amount of gross receipts which it derived during the calendar year 1946 from the transportation of imported freight of miscellaneous types was $154,560.00.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

6. Western Maryland Railway Company requests the Commission to rule as a matter of law that the tax imposed for the calendar year 1947 by Article 81, Section 95(a) of the Annotated Code of Maryland upon its gross receipts for the calendar year 1946, may not be imposed upon so much of taxpayer's gross receipts for the said calendar year 1946 as were derived from the transportation of imported and exported freight because to do so would be to impose a State tax which is prohibited by Article 1, Section 10, Clause 2 of the Constitution of the United States.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

7. Western Maryland Railway Company requests the Commission to rule as a matter of law that the tax imposed for the calendar year 1947 by Article 81, Section 95(a) of the Annotated Code of Maryland upon its gross receipts for the calendar year 1946, may not include that portion of taxpayer's gross receipts for the said calendar year 1946 which were derived from the transportation of exported and imported freight because to do so would violate Article 1, Section 8, Clause 3 of the Constitution of the United States.

Refused—3-24-48
J. H. A. R.
O. E. H.
W. W. T.

[fols. 50-52] Opinion and Order of the Commission

Omitted. Printed side page. 24 ante

[fols. 53-164] Secretary's certificate to foregoing transcript omitted in printing.

[fol. 165] In the Circuit Court No. 2 of Baltimore City

Docket 57 A—Folio 184—No. 29393 A

Western Maryland Railway Company

v.

State Tax Commission of Maryland, consisting of Joseph H. A. Rogan, Owen E. Hitchins and William W. Travers

Petition of Appeal from a Final Assessment of the State Tax Commission

To the Honorable, the Judge of Said Court:

The petition of Western Maryland Railway Company respectfully shows:

1. That your Petitioner is a body corporate, incorporated under the laws of Maryland and Pennsylvania, having its principal office in the Standard Oil Building, Baltimore 2, Maryland and is engaged in the transportation by rail of merchandise and passengers as a common carrier in both intra and interstate commerce in the states of Maryland, Pennsylvania and West Virginia.

2. That the defendants, Joseph H. A. Rogan, Owen E. Hitchins and William W. Travers, constitute the State Tax Commission of Maryland, and are hereinafter referred to as the State Tax Commission or the Commission. The address of the State Tax Commission is Davison Building, Charles and Fayette Streets, Baltimore 1, Maryland.

3. That Article 81, Sections 94½ to 100, inclusive, of the Annotated Code of Maryland impose an annual State tax as a Franchise tax measured by the gross receipts on all railroad companies doing business in the State at the rates therein prescribed.

4. That for the calendar year 1945 your petitioner's taxable gross receipts from all sources totalled $33,156,236.74, of which $2,619,800.68 were derived from freight traffic

which was in the process of importation into or exportation [fol. 166] from the United States.

That the latter total was computed as follows:

Exported Coal	$563,712.03
Exported Grain	628,360.99
Other Exported Freight	854,581.96
Imported Ores	529,227.42
Other Imported Freight	34,918.28
	$2,610,800.68

5. That of the above aggregate amount of $2,610,800.68, a total of $1,040,960.17, representing the proportion that the Petitioner's "all track" mileage within the State of Maryland, bore to its "all track" mileage within and without the State of Maryland or 39.8713% thereof, was allocated by the respondent as an integral part of the Petitioner's taxable gross receipts in Maryland.

6. That the respondents assessed a Franchise tax for 1946 of $320,892.26, which included $26,024.00 on the aforesaid Maryland portion of the gross receipts which your Petitioner derived from its export and import traffic in the year 1945.

7. That your Petitioner filed a timely protest with the respondents against the inclusion of any of its gross receipts derived from its export and import traffic for the purpose of computing the aforesaid tax.

That a hearing was held before the State Tax Commission on February 4, 1948, in which your Petitioner presented evidence to support its contention, but that notwithstanding such protest and hearing, the State Tax Commission filed an undated opinion and order in which it held that the tentative assessment against which protest had been made by your Petitioner was valid and Constitutional; and on March 24, 1948, the Commission entered a final assessment in which no deduction was allowed for Petitioner's gross revenues from export and import traffic.

8. That the imposition of State taxes upon revenues derived from export and import business is in violation of Article 1, Section 10, Clause 2 (the Export-Import Clause) of the United States Constitution and that, therefore, the Commission erred in including within Petitioner's taxable

[fol. 167] gross receipts the revenues which Petitioner derived from export and import traffic; and the Commission erred in denying Petitioner's requests for rulings submitted at the aforesaid hearing and further erred in disallowing Petitioner's protest.

WHEREFORE your Petitioner prays:

1. That this Honorable Court may enter its decree declaring that the respondents erred in including within your Petitioner's taxable gross receipts for the purpose of the tax imposed by Sections 94½ to 100, inclusive, of Article 81 of the Annotated Code of Maryland any part of such receipts which were derived from export-import traffic and that therefore the Commission's final assessment dated March 24, 1948, is unconstitutional and illegal to the extent that it purports to tax such receipts.

2. That this Honorable Court remand the case to the Commission for further proceedings in accordance with such decree as it may enter herein.

3. That this Honorable Court direct the State Tax Commission to find that the amounts as set forth in the foregoing petition are correct and that $26,024.00 of the Commission's final assessment of $320,892.26 is an erroneous and unlawful assessment.

4. That your Petitioner may have such other and further relief as the nature of its case may require.

And your Petitioner will ever pray, etc.

Western Maryland Railway Company, by: (S) B. T. McCoy, Treasurer.

(S) William C. Purnell, W. Harvey Small, 506 Standard Oil Building, Solicitors for Petitions.

[fol. 168] *Duly sworn to by B. T. McCoy. Jurat omitted in printing.*

[fol. 169] ORDER OF COURT

The foregoing Petition and affidavit having been duly considered, it is thereupon this 20th day of April, 1948,

ORDERED, ADJUDGED AND DECREED by the Circuit Court No. 2 of Baltimore City that the State Tax Commission of Maryland be, and it is hereby directed to transmit to the

Clerk of this Court, for filing in this proceeding, a certified copy of the said Commission's entire record and proceeding in connection with this appeal.

(S) E. Paul Mason, Judge.

[fol. 170] IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

57 A—folio 187—No. 29395 A

WESTERN MARYLAND RAILWAY COMPANY

v.

STATE TAX COMMISSION OF MARYLAND, consisting of Joseph H. A. Rogan, Owen E. Hitchins and William W. Travers

PETITION OF APPEAL FROM A FINAL ASSESSMENT OF THE STATE TAX COMMISSION

To the Honorable, the Judge of Said Court:

The petition of Western Maryland Railway Company respectfully shows:

1. That your Petitioner is a body corporate, incorporated under the laws of Maryland and Pennsylvania, having its principal office in the Standard Oil Building, Baltimore 2, Maryland and is engaged in the transportation by rail of merchandise and passengers as a common carrier in both intra and interstate commerce in the states of Maryland, Pennsylvania and West Virginia.

2. That the defendants, Joseph H. A. Rogan, Owen E. Hitchins and William W. Travers, constitute the State Tax Commission of Maryland, and are hereinafter referred to as the State Tax Commission or the Commission. The address of the State Tax Commission is Davison Building, Charles and Fayette Streets, Baltimore 1, Maryland.

3. That Article 81, Sections 94½ to 100, inclusive, of the Annotated Code of Maryland impose an annual State Tax as a Franchise tax measured by the gross receipts on all railroad companies doing business in the State at the rates therein prescribed.

4. That for the calendar year 1946 your petitioner's taxable gross receipts from all sources totalled $30,844,132.74, of which $5,149,439.42 were derived from freight traffic which

[fol. 171] was in the process of importation into or exportation from the United States.

That the latter total was computed as follows:

Exported Coal	$3,106,802.59
Exported Grain	736,511.24
Other Exported Freight	347,557.43
Imported Ores	804,008.16
Other Imported Freight	154,560.00
	$5,149,439.42

5. That of the above aggregate amount of $5,149,439.42, a total of $2,057,298.89, representing the proportion that the Petitioner's "all track" mileage within the State of Maryland, bore to its "all track" mileage within and without the State of Maryland or 39.9519% thereof, was allocated by the respondent as an integral part of the Petitioner's taxable gross receipts in Maryland.

6. That the respondents assessed a Franchise tax for 1947 of $298,444.91, which included $51,432.47 on the aforesaid Maryland portion of the gross receipts which your Petitioner derived from its export and import traffic in the year 1946.

7. That your Petitioner filed a timely protest with the respondents against the inclusion of any of its gross receipts derived from its export and import traffic for the purpose of computing the aforesaid tax.

That a hearing was held before the State Tax Commission on February 4, 1948, in which your Petitioner presented evidence to support its contention, but that notwithstanding such protest and hearing, the State Tax Commission filed an undated opinion and order in which it held that the tentative assessment against which protest had been made by your Petitioner was valid and Constitutional; and on March 24, 1948, the Commission entered a final assessment in which no deduction was allowed for Petitioner's gross revenues derived from export and import traffic.

8. That the imposition of State taxes upon revenues derived from export and import business is in violation of Article 1, Section 10, Clause 2 (the Export-Import Clause) of the United States Constitution and that, therefore, the Commission erred in including within Petitioner's taxable

[fol. 172] gross receipts the revenues which Petitioner derived from export and import traffic; and the Commission erred in denying Petitioner's requests for rulings submitted at the aforesaid hearing and further erred in disallowing Petitioner's protest.

WHEREFORE your Petitioner prays:

1. That this Honorable Court may enter its decree declaring that the respondents erred in including within your Petitioner's taxable gross receipts for the purpose of the tax imposed by Sections 94½ to 100, inclusive, of Article 81 of the Annotated Code of Maryland any part of such receipts which were derived from export-import traffic and that therefore the Commission's final assessment dated March 24, 1948, is unconstitutional and illegal to the extent that it purports to tax such receipts.

2. That this Honorable Court remand the case to the Commission for further proceedings in accordance with such decree as it may enter herein.

3. That this Honorable Court direct the State Tax Commission to find that the amounts as set forth in the foregoing petition are correct and that $51,432.47 of the Commission's final assessment of $298,444.91 is an erroneous and unlawful assessment.

4. That your Petitioner may have such other and further relief as the nature of its case may require.

And your Petitoner will ever pray, etc.

Western Maryland Railway Company, by: (S) B. T. McCoy, Treasurer.

(S) William C. Purnell, W. Harvey Small, 506 Standard Oil Building, Solicitors for Petitioner.

[fol. 173] *Duly sworn to by B. T. McCoy. Jurat omitted in printing.*

[fol. 174] ORDER OF COURT

The foregoing Petition and affidavit having been duly considered, it is thereupon this 20th day of April, 1948,

ORDERED, ADJUDGED AND DECREED by the Circuit Court No. 2 of Baltimore City that the State Tax Commission of Maryland be, and it is hereby directed to transmit to the

Clerk of this Court, for filing in this proceeding, a certified copy of the said Commission's entire record and proceedings in connection with this appeal.

(S) E. Paul Mason, Judge.

[fol. 174a] For Opinion dated June 24th, 1949, of Circuit Court No. 2 of Baltimore City, see side folio 201.

[fol. 175] IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

Docket 57 A—Folio 184—No. 29393 A

WESTERN MARYLAND RAILWAY COMPANY

v.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS, and WILLIAM W. TRAVERS, constituting the State Tax Commission of Maryland

ORDER OF COURT SUSTAINING STATE TAX COMMISSION

This case having come on for hearing; counsel for the respective parties having been heard; briefs having been filed; and the proceedings having been read and considered; it is this 29th day of June, 1949, by the Circuit Court No. 2 of Baltimore City

ORDERED, ADJUDGED AND DECREED that the decision of the State Tax Commission of Maryland to include in the measurement of petitioner's taxable Gross Receipts for the year 1946 those receipts derived from the transportation of export and import traffic, be and it is hereby sustained.

(S) Joseph Sherbow, Judge.

[fol. 176] IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

Docket 57 A—Folio 187—No. 29395 A

WESTERN MARYLAND RAILWAY COMPANY

v.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS, and WILLIAM W. TRAVERS, Constituting the State Tax Commission of Maryland

ORDER OF COURT SUSTAINING STATE TAX COMMISSION

This case having come on for hearing; counsel for the respective parties having been heard; briefs having been filed; and the proceedings having been read and considered; it is this 29th day of June, 1949, by the Circuit Court No. 2 of Baltimore City

ORDERED, ADJUDGED AND DECREED that the decision of the State Tax Commission of Maryland to include in the measurement of petitioner's Gross Receipts Tax for the year 1947 those receipts derived from the transportation of export and import traffic, be and it is hereby sustained.

(S.) Joseph Sherbow, Judge.

[fol. 177] IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

[Title Omitted]

Docket 57 A—Folio 184—No. 29393 A

ORDER FOR APPEAL

Mr. Clerk:

Please enter an appeal on behalf of Western Maryland Railway Company from the Decree passed on the 29th day of June, 1949, to the Court of Appeals of Maryland.

(S.) William C. Purnell, W. Harvey Smail, Solicitors for Appellant.

STATE OF MARYLAND,
Baltimore City, to wit:

I hereby certify, that on this 29th day of June, 1949, before me, the Subscriber, Clerk of the Circuit Court of Baltimore City, personally appeared W. Harvey Small and made oath in due form of law that this appeal is not made for the purpose of delay.

(S.) John S. Clarke, Clerk of the Circuit Court of Baltimore City.

[fol. 178] IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

Docket 57 A—Folio 187—No. 29395 A

[Title Omitted]

ORDER FOR APPEAL

Mr. Clerk:

Please enter an appeal on behalf of Western Maryland Railway Company from the Decree passed on the 29th day of June 1949 to the Court of Appeals of Maryland.

(S.) William C. Purnell, W. Harvey Small, Solicitors for Appellant.

STATE OF MARYLAND,
Baltimore City, to wit:

I hereby certify, that on this 29th day of June 1949, before me, the Subscriber, Clerk of the Circuit Court of Baltimore City, personally appeared W. Harvey Small and made oath in due form of law that this appeal is not made for the purpose of delay.

(S.) John S. Clarke, Clerk of the Circuit Court of Baltimore City

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[fol. 178a] (For Opinion and Final Decree of Court of Appeals of Maryland dated April 19, 1950, see side folio 211)

[fol. 179] IN THE COURT OF APPEALS OF MARYLAND

OCTOBER TERM, 1949

No. 76

WESTERN MARYLAND RAILWAY COMPANY, Appellant

v.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS and WILLIAM W. TRAVERS, Constituting the State Tax Commission of Maryland, Appellees

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, Ogle Marbury, Chief Judge of the Court of Appeals of Maryland:

The petition of Western Maryland Railway Company, Appellant, by its attorneys, William C. Purnell and W. Harvey Small, respectfully shows:

1. That on April 20, 1948, petitioner filed two petitions of appeal in the Circuit Court No. 2 of Baltimore City from final assessments made by the Appellees of gross receipts taxes for the years 1946 and 1947, measured by petitioner's gross receipts, earned during the calendar years 1945 and 1946 respectively, from the transportation of goods by railroad, including in the measure of said tax, gross receipts from the transportation of imports and exports moving in foreign commerce.

2. That the foregoing two petitions of appeal were heard together and that subsequently on June 24, 1949, the Circuit Court No. 2 of Baltimore City (Sherbow, J.) filed an opinion and thereafter on June 29, 1949 entered an Order in each case sustaining the final assessment as fixed by the Appellees.

3. That on June 29, 1949, petitioner appealed from the said Orders of Court to this Honorable Court, where the said two cases were heard together, and that thereafter this [fol. 180] Honorable Court entered its opinion and final decree on April 19, 1950, affirming the decision of the Circuit Court No. 2 of Baltimore City, and subsequently issued its Mandate on May 19, 1950, on which date also the time expired

within which any petition for reargument could be filed, and no such petition has been filed.

4. That petitioner alleges that in these cases the construction placed by the Appellees herein and by both the lower court and this Honorable Court on the statutes of the State of Maryland imposing the gross receipts tax, to wit, Article 81, Section 94½ of the Annotated Code of Maryland (1947 Supplement) and Sections 95-100 (inclusive) of the Annotated Code of Maryland (1939 Edition) are drawn in question on the ground that such construction thereof is repugnant to the Constitution of the United States of America and in particular to Article I, Section 10, Clause 2, thereof (the Import-Export Clause); and the decision of this Honorable Court sustained the validity of said construction of said statutes.

5. That petitioner has filed with the Clerk of this Honorable Court, accompanying this petition, an Assignment of Errors which more particularly sets forth the errors in the aforesaid opinion and final decree of April 19, 1950, upon which your petitioner relies as the basis upon which it is entitled to an appeal to the Supreme Court of the United States.

WHEREFORE, your petitioner prays for the allowance of an appeal from the final decree dated April 19, 1950, entered in this cause by the Court of Appeals of Maryland, to the Supreme Court of the United States, to the end that the Supreme Court of the United States may review the record and final decree entered by this Honorable Court, correct the errors assigned and may reverse the said final decree.

William C. Purnell and W. Harvey Small, Attorneys for the Petitioner, 506 Standard Oil Building, Baltimore 2, Maryland.

Baltimore, Maryland
July 10, 1950

[fol. 181] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IT APPEARING that Western Maryland Railway Company, Appellant, has this day duly filed with the Clerk of this Court and presented its petition to the Chief Judge of the Court of Appeals of Maryland for the allowance of an appeal to the Supreme Court of the United States from the final decree of the Court of Appeals of Maryland entered in this case on April 19, 1950; and

IT FURTHER APPEARING that the Appellant has at the same time duly presented and filed with the Clerk of the Court of Appeals of Maryland its Assignment of Errors and Jurisdictional Statement as required by the statutes and rules of the Supreme Court of the United States in such case made and provided;

NOW, THEREFORE, it is by the Chief Judge of the Court of Appeals of Maryland, this 10th day of July, 1950,

ORDERED that an appeal be and it is hereby allowed to the Supreme Court of the United States from the aforesaid final decree of the Court of Appeals of Maryland as prayed, and the Clerk of the Court of Appeals of Maryland is directed to prepare and certify a transcript of the record of proceedings in the above entitled case and transmit the same to the Supreme Court of the United States; and it is further

[fols. 182-185] Ordered that the Appellant shall give good and sufficient security in the sum of Five Hundred Dollars ($500.00) that Appellant shall prosecute said appeal to effect, and if said Appellant shall fail to make good its plea, then it shall answer for the costs of the proceeding; and Appellant having presented a bond in the sum of Five Hundred Dollars ($500.00) with Maryland Casualty Company as surety, it is hereby approved.

O. J. Marbury, Chief Judge, Court of Appeals of Maryland.

[fol. 186] Citation in usual form showing service on Hall Hammond omitted in printing.

[fol. 187] IN THE COURT OF APPEALS OF MARYLAND

[Title Omitted]

ASSIGNMENT OF ERRORS

Western Maryland Railway Company, Appellant, assigns the following errors in the record, proceedings and final decree of the Court of Appeals of Maryland in this case:

1. The Court of Appeals erred in deciding and decreeing that the Maryland statute (Article 81, Sections 94½ and 95 of the Annotated Code of Maryland) imposing a tax measured by gross receipts, which said Court has construed to be a franchise tax, may, notwithstanding the prohibition of Article I, Section 10, Clause 2 of the Constitution of the United States be so construed and applied as to require inclusion of gross receipts from the transportation and handling by railroad of exports and imports within the measurement of such tax.

2. The Court of Appeals erred in failing and refusing to decide and decree that Article 81, Sections 94½ and 95 of the Annotated Code of Maryland are unconstitutional to the extent that these statutes are construed and applied to require or permit the use of gross receipts from the transportation and handling by railroad of exports and imports as a measure of the State franchise tax upon the privilege of engaging in the transportation and handling by railroad of exports and imports, because as so construed and applied the tax is upon the process of exporting and importing which is forbidden by Article I, Section 10, Clause 2 of the [fol. 188] Constitution of the United States.

3. The Court of Appeals erred in failing and refusing to decide and decree that to the extent that Appellant is engaged in the transportation and handling by railroad of exports and imports, it is engaged in the exporting and importing process, any State taxation of which is prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States.

4. The Court of Appeals erred in assigning as a reason for its decision and decree sustaining the validity of the use of gross receipts from exporting and importing as part of the measure of the franchise tax, that there is "no reason why a franchise tax measured by gross receipts including

receipts from foreign commerce, should be valid under one clause [i.e., the Commerce Clause] and not under the other [i.e., the Import-Export Clause], particularly where the tax is in lieu of other permitted taxes", the Supreme Court having decided that the two constitutional clauses "while related are not coterminous", and having particularly decided that a State tax may be valid under the Commerce Clause and not valid under the Import-Export Clause.

5. The Court of Appeals erred in deciding and decreeing that "the tax here in question is not a direct tax on imports or exports", and in failing to decide and decree instead that the tax is a direct tax on imports and exports because it falls on the process of importing and exporting.

6. The Court of Appeals erred in deciding and decreeing that because an *ad valorem* property tax on property used to conduct importing and exporting business has been held valid by the Supreme Court, that "it certainly appear that a franchise tax in lieu of a direct *ad valorem* tax is not barred by the Import-Export Clause"; and in failing and refusing to decide and decree instead that whether or not the Maryland franchise tax, imposed by Article 81, Sections 94½ and 95 of the Annotated Code of Maryland, is in lieu of *ad valorem* property taxes, it is nevertheless prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States because such franchise tax as construed and applied by the Court of Appeals of Maryland falls upon the process of importing and exporting.

[fol. 189] 7. The Court of Appeals erred in deciding and decreeing that the processes of construction of the Commerce Clause (Article I, Section 8, Clause 3 of the Constitution of the United States) which contains no express prohibition against taxation, and pursuant to which taxes imposed in lieu of *ad valorem* property taxes have been sustained, are applicable to the Import-Export Clause (Article I, Section 10, Clause 2 of the Constitution of the United States) which does contain an express prohibition against taxation, and under which it is immaterial whether the tax in question is in lieu of other taxes, if it falls upon the process of importing and exporting.

8. The Court of Appeals erred in affirming the decision of the Circuit Court No. 2 of Baltimore City that the tax imposed by Article 81, Sections 94½ and 95 of the Anno-

tated Code of Maryland is "not on the business of importing or exporting and is so remote insofar as its effect on exports and imports or the process of exporting or importing as not to be in contravention of the constitutional clause", and in failing and refusing to reverse the said Circuit Court No. 2 of Baltimore City on the ground that rail transportation of imports and exports is the process of importing and exporting and, therefore, the tax as construed and applied by said lower court falls on the process of importing and exporting and is prohibited by the Import-Export Clause.

William C. Purnell and W. Harvey Small, Attorneys for Appellant, 506 Standard Oil Building, Baltimore 2, Maryland.

Baltimore, Maryland
July 10, 1950.

[fols. 190-201] In the Circuit Court No. 2 of Baltimore City

Canton Railroad Company

v.

Joseph H. A. Rogan, Owen E. Hitchins, and William W. Travers, Constituting the Sate Tax Commision of Maryland

Western Maryland Railway Company

v.

Joseph H. A. Rogan, Owen E. Hitchins, and William W. Travers, Constituting the State Tax Commission of Maryland.

Opinion—Filed June 24, 1949

These appeals by the Western Maryland Railway Company and the Canton Railroad Company are based upon the contention set up by the taxpayers that the gross receipts tax assessed under the provisions of Code, Article 81, Sections 94½ to 99 (1943 Supp.), inclusive, are unconstitutional and invalid as applied to the operating revenues of the railroads derived from their import and export business.

This code provision requires railroads and certain other public utilities to pay an annual tax "as a franchise tax * * * measured by the gross receipts for the preceding calendar year * * *" Taxable gross receipts are limited to operating revenues derived from business in this State. The tax has been in effect since 1872, but has never been directly passed upon by the Supreme Court of the United States. Our Court of Appeals has held that this tax does not violate the Commerce Clause of the Federal Constitution. (*Railroad* v. *State*, 92 Md. 668, 1901)

[fol. 202] Now for the first time the question is raised as to whether the Import-Export Clause of the Constitution of the United States prevents the State of Maryland from levying this tax on the gross receipts earned by railroads in this State from the transportation of exported and imported goods.

The amount of taxes involved in this controversy is considerable and will be high as long as export traffic remains at its present level. The methods of calculation are not before the court, although it is apparent the actual determination of export-import traffic is difficult, but not impossible, of ascertainment as the railroads keep complete detailed records of shipments.

The railroads filed their returns to the State Tax Commission in due course, but after several recent decisions of the U. S. Supreme Court they filed amended returns seeking to eliminate the gross receipts earned from the transportation of exported coal, grain and miscellaneous commodities, and of imported ores and other freight. The claim is based upon the Export-Import Clause, Article I, Section 10, Clause 2, of the Constitution of the United States, the taxpayers asserting this clause prohibited such State taxation.

After lengthy hearings the State Tax Commission held the tax was not prohibited by this constitutional provision and these appeals followed.

The Export-Import Clause of the Constitution, Article I, Section 10, Clause 2, is as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing

its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

This section of the Constitution is broad and all inclu-[fol. 203] sive with one exception not relevant here. It prohibits the State from levying any tax on exports or imports and from deriving any revenue from this source. This clause represented a compromise in the Constitutional Convention between those advocating local and those advocating national sovereignty. Its purpose was to end the strife that had characterized the Confederation. Southern States felt they would bear the brunt of imposts on imports if left to individual States for determination, while exporting States felt they would be at a trading disadvantage if other States taxed their products flowing through these States to foreign markets. By Article I, Section 9, of the Constitution, even Congress was placed under a disability to tax exports for fear of discrimination. Congress was given the power to regulate interstate and foreign commerce, but the power to tax exports was taken from the States to prevent coastal States from taxing goods produced inland and sold abroad. (The Federalist, No. 42; 3 Elliot's Debates, 252, 483; 14 U of C Law Review, 672.)

Over the years various cases came to the Supreme Court for determination as to whether the different taxes imposed from time to time violated this provision of the Constitution.

These cases range all the way from taxes on foreign bills of lading to taxes upon baseball equipment for foreign shipment. These cases are collected in various law review articles, where they are summarized, and are not repeated here. (See 14 University of Chicago Law Review, 669; 42 Illinois Law Review, 251; 59 Harvard Law Review, 627; 60 Harvard Law Review, 501 and 710.)

Then came the cases of Richfield Oil Corporation vs. State Board of Equalization (1946), 329 U. S. 69, and a short time later Joseph vs. Carter and Weeks Stevedoring Co. (1947), 330 U. S. 422.

[fol. 204] The Richfield Oil case involved the validity of the California Retail Sales Tax as applied to the sale of

oil for export. Under the California Law is was the duty of the vendor, Richfield Oil, to collect the tax from the vendee. In this instance the purchaser was the New Zealand Government. The oil was carried by pipe line from the refinery to storage tanks at the harbor, and then pumped into the hold of the steamer for shipment abroad.

The Supreme Court held that the Import-Export Clause prohibited the imposition of this State tax on this sale, with the opinion by Mr. Justice Douglas, six Justices concurring, and Mr. Justice Black dissenting. The opinion discusses the Import-Export Clause at some length and pointed out that "any" tax, whether discriminatory or not, is prohibited by the Export-Import Clause. There are no qualifications, and only one minor exception.

In applying this provision of the Constitution to the facts in that case the Supreme Court found that when the oil was delivered into the hold of the vessel "that delivery marked the commencement of the movement of the oil abroad." The process of exporting within the meaning of the Constitution began when the goods actually started their movement in foreign commerce, and then the immunity attaches.

The Joseph case, supra, involved the validity of the New York City gross receipts tax as applied to gross receipts derived from stevedoring. By a five to four decision the Supreme Court held the tax invalid under the commerce clause, but Mr. Justice Douglas (who wrote the opinion in the Richfield case) dissented, taking the view that the tax did not violate the commerce clause but did violate the Import-Export Clause. The majority did not base their [fol. 205] decision on the Import-Export Clause of the Constitution.

In the case of Joy Oil Co. vs. State Tax Commission, decided June 13, 1949, by the Supreme Court, 17 U. S. Law Week, 4508, Mr. Justice Frankfurter, speaking for the majority of the Court, held that a million and a half gallons of gasoline, marked for export, but held in Michigan for fifteen months awaiting adequate transportation facilities, was subject to an *ad valorem* property tax assessed by the City of Dearborn. The Court said, it was not enough "that by the rail shipment to Detroit one step in the process of of exportation had been taken * * *. The Export-Import Clause was meant to confer immunity from local taxation

upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

While it is true the Supreme Court, in Mr. Justice Douglas' opinion in Empresa Siderurgica, S.A., vs. County of Merced, decided May 31, 1949, 17 U. S. Law Week, 4431, held that "the tax immunity runs to the process of exportation and the transactions and documents embraced in it," it is equally true the Court was again passing on the direct tax on the article itself.

The taxpayers urge that Hooven & Allison vs. Evatt, 324 U. S. 652 (1945) is authority for holding that the importing process continues through the rail journey to an inland destination. The Court there held that the hemp in Ohio, ready for use in manufacture, still in its unbroken package, remained an import after the railroad journey was over. Again the Court was dealing with a tax on the article itself.

It is thus seen that the question presented in the Richfield Oil case, Joy Oil Co. case, the Empresa Siderurgica [fol. 206] case and the Hooven and Allison case, involved a tax on the articles themselves because those articles had obtained or retained the characteristics of exports or imports. But that is not the question in this case. Here the issue is whether the Maryland Gross Receipts Tax, as applied to the railroads involved, is a tax on the activity or process of exporting and importing.

In Crew-Levick Co. v. Pennsylvania, 245 U. S. 292 (1917), the Supreme Court held invalid a gross receipts tax levied against a taxpayer who was actually selling exports. That case established the rule that a gross receipts tax imposed upon the business of selling goods in foreign commerce was, in effect, "a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution." But the Crew-Levick case did not decide that every non-discriminatory gross receipts tax imposed upon or which might influence, the export business was invalid, nor did it define, for all purposes, the scope of activities which might be embraced within the concept of the "export business."

It seems obvious that the railroads here involved are not engaged in the exporting or importing business. These

carriers do not control the shipments of the products other than to bring them, in certain cases, to the water's edge. Here, unlike the taxpayer in the Crew-Levick case, the railroads are not concerned directly with foreign markets and foreign buyers. While it may be true that the railroads, in part, make possible that other persons may engage in the export-import business, such assistance does not convert the carriers into exporters or importers themselves.

Taking the contention of the railroads in its most favorable light, therefore, it can be seen that they seek to have [fol. 207] held invalid the Maryland Gross Receipts Tax because it is imposed not upon the business or process of importing and exporting but upon an activity which merely assists other persons to engage in that business. No Supreme Court case has gone this far, and, in my opinion, the contention is without merit.

The Court holds that the Maryland Gross Receipts Tax is too remote and indirect to be affected by the Export-Import Clause. Goods are in transit on these railroads at all times, but are not in the process of exportation until delivered to the ultimate carrier for shipment abroad. The State tax is not a tax on exports or imports or on the business or process of exporting or importing, but is a tax on the privilege of operating a railroad in the State of Maryland, and is in lieu of certain other taxes. (See State Tax Commission vs. Western Md. Ry., 52 A. 2d, 615.) The tax is not levied on the goods exported or imported, or the proceeds, or the privilege of exporting or importing.

All transportation in some manner affects to some degree exports and imports. The real question is, how much and how direct, and whether there is a close and substantial relationship to exports and imports as to come within the prohibition of the Constitution.

There must at some point be a distinction between the direct and indirect effects of any tax. We must determine what its limit is and what its practical appliciation amounts to.

This clause does not reach all enterprises and transactions which have a remote and indirect affect on exports and imports, otherwise it would embrace every kind of tax. The income tax paid by a railroad in some measure affects exports and imports and is based in some degree on the

profits from such traffic. Other taxes paid by railroads of [fols. 208–210] necessity affect exports and imports, but such affect is indirect and remote.

These railroads do not engage in foreign commerce, nor do they control the shipments of the products other than to bring them to other carriers for export or to receive them from other carriers for further transportation inland. To hold that they are engaged in exporting and importing because the merchandise is ultimately actually shipped abroad or received from foreign countries is another way of saying that that which was indirect has become direct.

It appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its affect on exports and imports or the process of exporting or importing as not to be in contravention of the constitutional clause already mentioned.

The decision of the State Tax Commission in each case is sustained.

(S.) Joseph Sherbow, Judge.

[File endorsement omitted.]

[fol. 211] In Court of Appeals of Maryland, October Term, 1949

Nos. 76-96

Western Maryland Railway Co.

vs.

State Tax Commission of Maryland

Canton Railroad Co.

vs.

Joseph H. A. Rogan, et al., const. the State Tax Commission Md.

Argued before Marbury, C. J.; Delaplaine, Collins, Grason, Henderson and Markel, JJ.

Opinion by Collins, J.—Filed April 19, 1950

Delaplaine, J., and Markell, J., dissent.

[fol. 212] These appeals are taken by Western Maryland Railroad Company (Western Maryland) and Canton Rail-

road Company (Canton), from decrees of Circuit Court No. 2 of Baltimore City sustaining final assessment against the appellants made by the Maryland State Tax Commission (the Commission) for gross receipts taxes imposed by Article 91, Section 95 of the 1943 Supplement of the Code.

In the case of Western Maryland the contested taxes for the years 1946 and 1947 are computed upon its gross receipts within the State of Maryland for the preceding calendar years of 1945 and 1946, respectively. In the case of Canton the contested taxes for the year 1947 were computed upon its "gross receipts for the calendar year 1946" within the State of Maryland. Both appellants claim that certain portions alleged to have been derived from their services rendered in "the importing and exporting process" should not have been included within the total amount of gross receipts subject to the tax. They claim that Article 1, Section 10, Clause 2, of the Constitution of the United States grants immunity to that portion of the gross receipts.

The pertinent provisions of Article 81, sections 94½ and 95, 1945 Supplement of the Code follow:

> "94½. The phrases 'gross receipts,' 'total receipts,' 'gross earnings,' 'total earnings' and 'all earnings', as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind whatsoever. When any public [fol. 213] service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.
>
> 95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

(1) All domestic or foreign railroad companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:

One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * * *

(b) If any such railroad company has part of its road in this state and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

(c) Every partnership or individual engaged in any [fol. 214] of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

The so-called Import-Export clause of the Constitution of the United States, Article 1, Section 10, Clause 2, follows:

"No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, ex-

cept what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." See The Federalist, No. 42; 3 Elliot's Debates, 483; 14 U. of Chicago Law Review, 672.

The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores, and other miscellaneous commodities in transit between foreign ports and points within the United States. Appellant (Canton) claims that the tax in question is an occupation tax exacted for the privilege of engaging in the import-export process and therefore unconstitutional. This Court in a long line of cases has sustained the statutory declaration, supra, that the tax here in question is a franchise tax in lieu of all other State taxes.

In the case of State v. Philadelphia, Wilmington, and Baltimore Railroad Company, 45 Md. 361, the Court had before it Chapter 234 of the Acts of 1872 which was the predecessor of the present Gross Receipts Tax. This Court said in that case at page 379 in holding the tax constitutional; "Properly speaking, the tax is not imposed upon the gross receipts; they are referred to not as descriptive [fol. 215] of the subject to be taxed, but merely as furnishing the basis of ascertaining the amount of tax to be paid. If then it is not a tax upon property, what is it? We say, it is a tax upon the *franchise* of railroad companies, measured by the extent of their business." At page 381 it was said: "Being of opinion, then, that the tax upon gross receipts of railroad companies, imposed by the Act of 1872, is a tax upon the franchise of such companies, and not upon their property, * * * we come to the question whether the defendant corporation is exempt from the payment of said tax?" State vs. B. & O. R. R. Co. 48 Md. 49 (1878); Cumberland vs. Pennsylvania R. R. Co. 92 Md. 668 (1901); State v. U. S. F. G. Co. 93 Md. 314 (1901); State v. Central Trust Co., 106 Md. 268 (1907); Postal Telegraph Cable Co. v. Harford

County, 131 Md. 96 (1917); Rogan v. Baltimore & Ohio Railroad Co., 188 Md. 44 (1947); State Tax Commission v. Western Maryland Railway Co., 188 Md. 240, 246 (1947).

Western Maryland makes no contention that this is not an in lieu franchise tax. Canton to sustain its contention that the tax is an occupation tax and not an in lieu franchise tax cites Section 144 of Article 81 of the Code (1947 Supplement) which imposes a general franchise tax on corporations. Section 144 (b) explicitly says that the tax is imposed "for its franchise to be a corporation." Sections 95, supra, and 144 supra, tax different kinds of franchises. The franchise to operate a railroad is of course different from the ordinary privileges conferred by a franchise to operate [fol. 216] as a corporation.

Canton also contends that the tax here in question is not a franchise tax in lieu of property taxes because it is not proportionate in amount to the property taxes to which it would have been liable. Canton bases this argument on the fact that if the ordinary rate of State taxes is applied to the assessed value of its property for the calendar year 1946 its taxes would have been $3800.00 while its gross receipt taxes for that period amount to $39,092.00. Appellee points out in its brief that when Chapter 965 of the Acts of 1945, (substantially reenacted, except as to rates, by Chapter 677 of the Acts of 1947 and codified as Sections 7 (15), 25 (h), 94½ and 95 of Article 81, 1947, Supplement of the Code), is taken into consideration Canton's ad valorem property tax for the calendar year of 1946, as taxes on operating property, including land, would have been $40,681.00, an amount of $1000.00 "more than the amount of gross receipt taxes imposed for the gross receipts derived during that calendar year." Nashville C. & St. L. Ry. vs. Browning, 310 U. S. 362. Ohio River & W. R. Co. vs. Dittey, 232 U. S. 576.

Appellant (Canton) states in its brief: "If it were an original proposition, one might well argue that the phrase 'any Imposts or Duties on Imports or Exports' was intended to mean no more than property taxes on goods while they constitute imports or exports, or, at the most, taxes in the nature of a tariff. The construction which the Su- [fol. 217] preme Court has placed upon these words through the years is to the contrary."

The in lieu franchise tax on apportioned gross income has been held valid under the Commerce Clause of the Constitution because it is not a direct tax on interstate business, not because the tax does not in the end increase the cost of interstate business. Such taxes are held valid because they are in lieu taxes and substitute for a property tax which is constitutional. Maine v. Grand Trunk Railroad Co., 142 U. S. 217, (1891); U. S. Express Co. v. Minnesota, 223 U. S. 335, (1912); Cudahy Packing Co. v. Minnesota, 246 U. S. 450, (1918); Northwestern Life Insurance Co. v. Wisconsin, 247 U. S. 132, (1918); Great Northern Railway Co. v. Minnesota, 278 U. S. 503, (1929); Illinois Central Railway Co. v. Minnesota, 309 U. S. 157, (1940); State Tax Commission v. Western Maryland Railway Co. 188 Md. 240, supra.

An ad valorem property tax on tangible and intangible personal property both used in and derived from the process of importing and exporting is valid. W. P. & Cincinnati Transport Co. vs. Wheeling, 99 U. S. 273, (1879). Burke vs. Wells, 208 U. S. 14. If such an ad valorem tax is constitutional it certainly appears that a franchise tax in lieu of such direct ad valorem taxes is not barred by the Import-Export Clause. New York, ex rel. Parke, Davis & Co. vs. Roberts, 171 U. S. 658 (1898). People, ex rel. American Soda Fountain Co. vs. Roberts, 158 N. Y. 168 (1899).

[fol. 218] Both Canton and Western Maryland contend that this tax measured by the gross receipts for handling articles previously imported or to be exported and in "the importing and exporting process," is prohibited by the Import-Export Clause. Of course, a direct tax on imports and exports such as a license tax on the occupation of importing, a direct tax on sales of imports and exports, a tax on the actual doing of an import business, a direct tax on objects in process of importing or exporting, are constitutionally invalid under the Import-Export Clause. Brown vs. Maryland, 12 Wheat. 419, (1827); Crew Levick Co. vs. Pennsylvania, 245 U. S. 292; Anglo-Chilean Nitrate Sales Corp. vs. Alabama, 288 U. S. 218; Spalding & Bros. vs. Edwards, 262 U. S. 66; Hooven & Allison Co. v. Evatt, 324 U. S. 652.

The tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on

an export bill of lading for wheat exported; or an ad valorem tax on warehouse receipts issued on account of whisky physically in a foreign country; or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance which were held to be an integral part of exportation. Almy vs. California, 65 U. S. 169, (1861); Fairbanks vs. United States, 181 U. S. 283, (1901); Selliger vs. Kentucky, 213 U. S. 200, (1909); United States vs. Hvoslef, 237 U. S. 1, (1915); Thames & Mersey Insurance Co. vs. United States, 237 U. S. 19, (1915).

[fol. 219] In W., P. & Cincinnati Transport Company vs. Wheeling, 98 U. S. 273, 25 L. Ed. 412 (1879), supra, the city of Wheeling imposed a presonal property tax upon vessels in the amount of $.50 on each $100 of the assessed value thereof. These vessels were used in the import-export traffic. The tax was attacked. The Supreme Court in holding this tax valid and constitutional said in part: "Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of those prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of the Federal Government. State Tonnage Tax Cases, 12 Wall., 204 (79 U. S., XX., 370)." One of the cases relied on by the Court in that opinion was the Maryland case of Howell v. State, 3 Gill 14.

In New York ex rel. Burke v. Wells, 208 U. S. 14, 52 L. Ed. 370 (1908), supra, the City of New York assessed for ad valoreum personal property taxes, among other things, the cash on hand and notes owned by a foreign corporation doing business in New York State as importers, which were the proceeds of the sale of imported goods in the unbroken original packages. The Supreme Court of the United States held that those items could be taxed under the New York [fol. 220] law as capital employed in business within the State without infringing Article I, Section 10, of the Constitution of the United States, although most of the pro-

ceeds of such sales were remitted to the home office of the corporation in Ireland.

In New York, ex rel. Parke, Davis & Co. v. Roberts, 171 U. S. 658, 43 L. Ed. 323 (1896), supra, it was held that a franchise tax on the amount of the capital stock employed within the State by a foreign corporation conducting a strictly private business is not invalid because a part of its business consists of the importation and sale of articles in original packages. It was contended in that case that this tax was unconstitutional and invalid under the case of Brown v. Maryland, supra. In reply to that argument the Supreme Court of the United States said: "But that case is inapplicable. *Here no tax is sought to be imposed directly on imported articles or on their sale.* This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested." (Italics supplied here.) [fol. 221] As herein stated the contested taxes here are for the years 1946 and 1947. Evidently the appellants rely largely on decisions of the Supreme Court of the United States since and beginning in 1946. Great reliance is placed by appellants on the case of Richfield Oil Corporation v. State Board, 329 U. S. 69 (1946). The majority opinion was written by Mr. Justice Douglas with Mr. Justice Black dissenting. In that case by statute California levied a retail sales tax on certain oil "measured by the gross receipts of retail sales and levied on retailers 'For the privilege of selling tangible personal property at retail.'" The Richfield Oil Corporation contracted with the government of New Zealand for the sale of Oil, f.o.b. Los Angeles. Payment was to be made in London. Delivery was made by Richfield by its own pipe lines from its refinery in California to storage tanks at the Los Angeles harbor and pumped directly from the storage tanks into a vessel owned by the New Zealand government, in the harbor of Los Angeles, and consigned to the Naval Officer-in-Charge at Auckland, New Zealand. No portion of the oil was used or consumed in the United States. The Supreme Court of the United States,

reversing the California Supreme Court held that the oil became an export no later than when it was delivered into the vessel and when the passage of title by delivery of the oil into the vessel took place, the oil had become an export. This sales tax was therefore a direct tax upon an export [fol. 222], and violated the Import-Export Clause. This case was very similar to and naturally followed the decision in Crew Levick Co. v. Pennsylvania, 245 U. S. 292, supra.

Joseph v. Carter & Weekes Co., 330 U. S. 422 (1947), involved a New York State occupation tax upon stevedoring measured by gross receipts from servicing ships at the port of New York. The goods moved both in interstate and foreign commerce. The majority of the Supreme Court of the United States held that this tax violated the Commerce Clause of the Constitution but made no reference to the Import-Export Clause which was argued to the Court. The majority opinion was written by Mr. Justice Reed, concurred in by the Chief Justice, and Justices Frankfurter, Jackson, and Burton. Mr. Justice Black dissented totally from the majority opinion. Justices Douglas, Rutledge, and Murphy dissented on the proposition that the Commerce Clause was violated. Justices Douglas and Rutledge dissented from the invalidity of the tax under the Commerce Clause but were of opinion that it was invalid under the Import-Export Clause. This dissenting opinion was based upon the cases of Thames and Mersey Ins. Co. v. United States, 237 U. S. 19, supra; Spalding & Bros. v. Edwards, 262 U. S. 66, supra; Richfield Oil Corp. v. State Board, 329 U. S. 69, supra. The tax here before us is certainly not comparable under the Import-Export Clause to the following taxes before the Supreme Court in the last three cases cited: a tax applied against a contract of marine insurance which is an [fol. 223] integral part of exportation and so vitally connected therewith that a tax on the insurance policies is essentially a tax upon the export; a tax upon baseballs sold by a manufacturer in New York to a firm in Venezuela, marked for delivery to the purchaser in Venezuela and delivered to the carrier as directed by the purchaser; a sales tax upon oil as in the Richfield Oil case, supra.

Joy Oil Company v. State Tax Commission, 337 U. S. 286, (1949) involved a personal property ad valorem tax. The gasoline on which the tax was levied was transported from Grand Rapids to Detroit, Michigan, for export, where it

was placed in storage tanks from which it was to be shipped by water to Canada. On account of the inability of the taxpayer to obtain shipping space, the gasoline, except for 50,000 gallons exported, remained in Detroit for about fifteen months. The majority of the Supreme Court of the United States held that while the gasoline was stored in Detroit it did not constitute an export because it might have been used for domestic purposes. Four Justices dissented on the ground that all of the facts indicated that the gasoline would be exported. The minority opinion therefore was based on the fact that this was a direct tax on an export and therefore a violation of the Import-Export Clause. Another case involving an invalid direct tax on articles in export is Empresa Siderurgica, S. A. v. County of Merced, 337 U. S. 154, (1949). That case is not in point here.

[fol. 224] It is argued that the Import-Export clause should be given a more prohibitive effect than the Commerce clause because of the fact that the former contains an express tax exemption whereas the latter does not. Neither clause literally supports the interpretations that have been put upon them by unchallenged decisions. The Commerce clause has been extended by implication to prohibit state exactions regardless of Federal regulation, and the Import-Export clause has been extended to cover not only exactions upon the goods themselves but on the integral parts of exportation. The solution of the problem as to where the line should be drawn can hardly depend on verbalism. We find no case dealing with the precise question now presented. On principle, we see no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes.

Decrees affirmed, with costs.

[fol. 225] IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1949

Nos. 76-96

WESTERN MARYLAND RAILWAY CO.

v.

STATE TAX COMMISSION OF MARYLAND

CANTON RAILROAD COMPANY

v.

JOSEPH H. A. ROGAN, et al., const. the State Tax Comms. of Maryland

Argued before Marbury, C. J., Delaplaine, Collins, Grason, Henderson and Markell, JJ

Dissenting Opinion by

Markell, J.
in which Delaplaine, J.
concurs.

Filed April 19, 1950

[fol. 226] On a federal question our duty is to follow the Supreme Court, not to try to lead it. In the fourth Texas primary case, *Smith* v. *Allwright*, 321 U. S. 649, 652, the court remarked that the district court had denied relief and "the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey* v. *Townsend*, 295 U. S. 45 (the third Texas primary case)." The court thereupon overruled *Grovey* v. *Townsend* and reversed the action "quite properly" taken by the lower court. We are not at liberty to guess about personalities, changes in personnel, or possible future changes in decisions, or to take the obscurantist attitude that determination of the present status of the authorities amounts to searching into the inscrutable and that we should therefore sustain the tax and let the Supreme Court strike it down if it will. As we have recently said, through Chief Judge Marbury, "If the Supreme Court did not mean what it said, or said more than it should, or

what it should not have said, the responsibility is its and not ours." *Goetz* v. *Smith*, ... Md. ....., 62A 2d 602, 604. We may, and should, compare opinions of the court with dissenting opinions to determine the line of demarcation between them and the scope of the decisions of the court.

Cases under the Import-Export Clause are few in comparison with the multitude under the Commerce Clause. [fol. 227] For the first 150 years of the operation of the Constitution the Import-Export Clause, approximately but to a fluctuating degree, covered in the same way part of the same field as the Commerce Clause. Consequently in a case involving the broader field of the Commerce Clause it was seldom necessary to discuss the Import-Export Clause at all. In *Crew Levick Co.* v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 295, in which the court held invalid a gross receipts tax on the business of selling goods in foreign commerce, it was said, "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an import upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an import upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." For the last ten years the field covered by the Import-Export Clause has, to an important extent, included taxes not prohibited by the Commerce Clause. This important difference between the coverage of the two clauses is not due to changes in decisions under the Import-Export Clauses, with which we are here concerned, but to changes in decisions under the [fol. 228] Commerce Clause with which fortunately we are not concerned. With one exception (which will now be mentioned but is not now material) there has been from the first no change in the decisions under the Import-Export Clause. In *Brown* v. *Maryland*, 12 Wheat. 419, 449, (1827), it was "supposed" and in *Almy* v. *California*, 24 How. 169, (1861), it was assumed, as the basis of an unanimous opinion, that the Import-Export Clause is applicable to "imports" and "exports" from one state into another. In *Woodruff* v.

Parham, 8 Wall. 123, (1869), these dicta were discarded and the clause held applicable only to imports from and exports to a foreign country.

On their face the Import-Export Clause and the Commerce Clause suggest two possible differences, (1) the Commerce Clause covers "commerce", the Import-Export Clause "imports" and "exports", which conceivably might be construed as meaning only the goods imported or exported, not the business or process of importation or exportation, (2) the Commerce Clause does not contain any express tax exemption, the Import-Export Clause does. In *Brown* v. *Maryland*, *supra*, the first case under the Import-Export Clause, the first possible difference was negative. That clause ever since has been construed as exempting from taxation not only the goods imported or exported, but the business and the process of importation or exportation. The second possible difference was never completely excluded, for about 150 years in a varying degree was almost [fol. 229] eliminated, but in the last ten years has been definitely affirmed.

Until 1869 the Import-Export Clause was assumed to give an express tax exemption to transportation in foreign or interstate commerce. In 1873 there were decided the *State Freight Tax*, 15 Wall. 232, and the *State Tax on Railway Gross Receipts*, 15 Wall. 284, the former holding invalid a tax on freight, including interstate freight, at graduated rates per ton on different articles, the second sustaining a Pennsylvania tax on railway gross receipts, including receipts from interstate commerce. The opinions in both cases were delivered by the same justice, but only four justices concurred in both decisions, which were essentially irreconcilable. After repeated subsequent decisions consistent with the *State Freight Tax*, the *State Tax on Railway Gross Receipts* was in effect overruled in *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, (1887).

Thereafter until about ten years ago it was held that interstate commerce, and specifically gross receipts from such commerce, were exempt from state taxation, with one important but elusive exception, viz., a gross receipts tax, by whatever name called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor

is not unconstitutional. *Maine* v. *Grand Trunk Railroad Co.*, 142 U. S. 217, (1891), as explained in *Postal Cable Co.* v. *Adams*, 155 U. S. 688, (1895) and *Galveston, Harrisburg* [fol. 230] *and San Antonio Railway Co.* v. *Texas*, 210 U. S. 217, 227, (1908). Such a permitted tax has been called a commutation tax (210 U. S. 226) and, by counsel in the instant case, an "in lieu" tax. For about ten years, beginning with *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, (1940), the court has narrowed the effect of the Commerce Clause as prohibiting taxes which burden interstate commerce. The court still holds that, "From the Commerce Clause itself, there comes * * * an abridgement of the state's power to tax within its territorial limits. This has arisen from long-continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce [4] and that this rule applies in full force to an unapportioned [5] tax on the gross receipts from interstate business,[6] where the taxes were not in lieu of *ad valorem* taxes on property.[7] (Citing cases in footnotes 4, 5, 6 and 7.)" *Joseph* v. *Carter & Weakes Co.*, 330 U. S. 422, 427. In the case just quoted a state tax on the gross receipts of a stevedoring corporation from work on ships engaged in interstate and foreign commerce was held unconstitutional under the Commerce Clause. The statement quoted is appreciably narrower than it might have been before the *Berwind-White* case.

In *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 68, decided a few months before the *Joseph* case, the court indicated the change that had occurred in [fol. 231] the recent Commerce Clause cases, and, what is more important and, I think, decisive in the instant case, the difference in this respect between the Commerce Clause and the Import-Export Clause. " * * * the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. (Citing cases). But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way.

As recently stated in *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits (see *e.g. Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254-255, and cases cited; *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue [fol. 232] burden on it. (Citing cases)." After thus describing the somewhat tenuous line between taxes which are prohibited and those which are permitted under the Commerce Clause, the court then makes plain that there is no exception at all from the unqualified tax exemption under the Import-Export Clause.

"It seems clear that we cannot write any such qualification into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other." 329 U. S. 75-76.

* * *

"We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U. S. 78. In the *Richfield* case the court held unconstitutional under the Import-Export Clause application of a

[fol. 233] California gross receipts sales tax to an export shipment.

As a decision under the Import-Export Clause the *Richfield* case is not qualified, but reaffirmed, by the *Joseph* case. In the *Joseph* case five justices broadened the invalidation of the tax to include interstate commerce as well as imports and exports, seven condemned it as to imports and exports. It is impossible to escape Professor Powell's interpretation of the opinions in this respect. 60 Harvard Law Review 744. Though the majority opinion does not mention the Import-Export Clause it cites the Crew-Levick case to the very page quoted, *supra*, where the court said the two questions were one. Reason and authority may be surveyed in vain without finding any ground for holding that a tax, invalid under the Commerce Clause, could be valid, as to imports or exports, under the Import-Export Clause.

A tax on gross receipts from carriage of goods is manifestly a tax on exportation. Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation. The Export Clause (as far as it goes) is identical in scope with the Import-Export Clause. In *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19, a stamp tax on marine insurance policies on exports was held unconstitutional. The court said, "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a [fol. 234-236] burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process." 237 U. S. 27. The major premise, that a tax on freight is a tax on exports, was taken as axiomatic.

Under the Commerce Clause, since the recent cases and perhaps before, it may be that the Maryland gross receipts tax is constitutional as an "in lieu" tax. Canton, but not Western Maryland, disputes this proposition on the facts, but the fact question, I think, is not adequately presented on the record. So far as imports and exports are concerned, the question as to the Commerce Clause is immaterial. In the Import-Export Clause "the prohibition

against 'any' tax on imports and exports contains no implied qualification." It matters not, therefore, what is the present scope or extent of the "in lieu" qualification or exception to the cases condemning gross receipts taxes under the Commerce Clause. Before the instant cases no question as to the constitutionality of the gross receipts tax under the Import-Export Clause has ever been raised.

I think the tax, as to imports and exports, is unconstitutional and the judgment should be reversed.

Judge Delaplaine authorizes me to say that he concurs in this opinion.

[fol. 237] IN THE COURT OF APPEALS OF MARYLAND

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Court of Appeals of Maryland:

You are hereby requested to forward a transcript of the record to the Supreme Court of the United States pursuant to an appeal in the above entitled case, and to include in said transcript of record the following papers, to wit:

1. The entire transcript on appeal to the Court of Appeals of Maryland from the Circuit Court No. 2 of Baltimore City.

2. The Majority Opinion and Decree of the Court of Appeals of Maryland entered April 19, 1950.

3. The dissenting Opinion entered by Judges Markell and Delaplaine, in the Court of Appeals of Maryland, April 19, 1950.

4. The Petition for Allowance of Appeal to the Supreme Court of the United States.

5. Assignment of Errors.

6. Jurisdictional Statement.

7. Cost Bond for appeal and approval thereof.

8. Order Allowing Appeal.

9. Citation and Acknowledgment of Servicing thereof.

10. Notice of Service on Appellee of Petition for Allowance of Appeal, Order Allowing Appeal, Assignment of [fol. 238-240] Errors, Jurisdictional Statement, Notice as

to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court with Acknowledgment of Service thereof.

11. This Praecipe

William C. Purnell, W. Harvey Small, Attorneys for Appellant, 506 Standard Oil Building, Baltimore 2, Maryland.

Service of the foregoing Praecipe and the receipt of a copy thereof are hereby acknowledged this 10th day of July, 1950, and it is hereby agreed that the matters set forth in said Praecipe constitute the entire transcript of record on this appeal.

Hall Hammond, Attorney; —— —— Assistant Attorney General, Attorneys for Appellees.

[fol. 241] IN THE SUPREME COURT OF THE UNITED STATES

Designation of Record to be Printed and Points of Law to Be Relied Upon By Appellant Pursuant to Rule 13, Paragraph 9, of the Revised Rules of the Supreme Court of the United States

Filed July 26, 1950

1. Western Maryland Railway Company, Appellant, hereby designates the following parts of the record heretofore filed in the above entitled proceeding as necessary to a consideration thereof, and to be printed by the Clerk of this Honorable Court:

Page 1 to 53, inclusive
Pages 165 to 182, inclusive
Pages 186 to 238, inclusive.

2. Appellant further states that it intends to rely upon the points more fully set forth in its Assignment of Errors.

William C. Purnell, W. Harvey Small, Attorneys for Appellant, 506 Standard Oil Building, Baltimore 2, Maryland

Baltimore, Maryland
July 25, 1950

PROOF OF SERVICE

Service of copy admitted this 26th day of July, 1950.

Hall Hammond, Attorney General of Maryland;
Attorney for Appellees.

[fol. 241a] [File endorsement omitted]

[fol. 242] SUPREME COURT OF THE UNITED STATES.

Order Noting Probable Jurisdiction

October 9, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

[fol. 243] Endorsed on Cover: File No. 54711, Maryland Court of Appeals. Term No. 205. Western Maryland Railway Company, Appellant, vs. Joseph H. A. Rogan, Owen E. Hitchins and William W. Travers, Constituting the State Tax Commission of Maryland. Filed July 18, 1950. Term No. 205 O. T. 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 205

WESTERN MARYLAND RAILWAY COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

STATEMENT AS TO JURISDICTION

WILLIAM C. PURNELL,
W. HARVEY SMALL,
Counsel for Appellant.

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IN THE COURT OF APPEALS OF MARYLAND

WESTERN MARYLAND RAILWAY COMPANY,

Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND

Appellees

JURISDICTIONAL STATEMENT

Statutory Provisions Governing Jurisdiction of the Supreme Court of the United States

A statute of the State of Maryland (quoted in full below) levies a franchise tax measured by gross receipts upon various businesses including railroads. Appellant in all of the proceedings below challenged the authority of the State administrative officials to include gross receipts from transportation and handling of imports and exports in the measure of the tax, on the ground that as thus applied the statute imposed a tax on imports and exports forbidden by Article I, Section 10, Clause 2 of the Constitution of the United States. The Court of Appeals of Maryland, which is the highest Court of the State, (two of six Judges dissenting) rejected Appellant's contention and held that the State statute as so applied was valid and was not unconstitutional.

Jurisdiction to entertain this appeal is, therefore, conferred by United States Code, Title 28, Section 1257 which empowers the Supreme Court of the United States to review final decrees of the highest Courts of the States:

> "(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Maryland Statute Which Is Involved

The Maryland gross receipts tax which is challenged by Appellant in this case is imposed by Section 95 of the Annotated Code of Maryland (1939 Edition) and reads as follows:

> "(a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:
>
> (1) All domestic or foreign railroads companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:
>
> One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile and
>
> Two per centum on all gross earnings above $1,000 and up to $2,000 per mile, and
>
> Two and one-half per centum on all earnings in excess of $2,000 per mile.
>
> (2) Every domestic or foreign telegraph or cable, express or transportation, parlor car, sleeping car, safe deposit and trust company doing business in this State, at the rate of two and one-half per centum (2½%); provided, however, that the gross receipts tax payable in the year 1932 and in subsequent years,

by safe deposit and/or trust companies shall be computed and paid at the rate of two and one-half per centum (2½%) with respect only to their safe deposit and trust business, including all receipts derived from the business of acting in a fiduciary or representative capacity, and at the rate of two per centum (2%) on all receipts derived from the business of insurance or guaranty (if any), without any deductions or credits of any kind whatsoever.

(3) All domestic and foreign telephone and oil pipe line companies and title insurance companies doing business in this State at the rate of two per centum (2%); provided, however, that the gross receipts tax payable in the year 1932 and in subsequent years by title insurance companies shall be computed and paid at the rate of two per centum (2%) with respect only to their receipts derived from the business of insurance or guaranty, without any deductions or credits of any kind whatsoever.

(4) All domestic and foreign electric light or power companies doing business in this State, at the rate of one (1%) per centum.

(5) All domestic and foreign gas companies doing business in this State, at the rate of one and one-half (1½%) per centum.

(b) If any such railroad company has part of its road in this State and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, tele-

phone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

The Court of Appeals in the present case said, "This Court in a long line of cases has sustained the statutory declaration, *supra*, that the tax here in question is a franchise tax in lieu of all other State property taxes" (see Opinion of Court of Appeals in this case printed as an appendix to the Statement as to Jurisdiction in *Canton R. R. Co.* v. *Rogan*, No. 96, October Term, 1950).

This Appeal Has Been Taken Within Proper Time Limits

The final decree of the Court of Appeals of Maryland in this case was entered on April 19, 1950, and under the rules of that Court constitutes the concluding entry following the opinion reading "Decree affirmed with costs."

On May 19, 1950 the time expired within which a motion for reargument could have been filed. No such motion was filed on or prior to that date, and accordingly the Court of Appeals on May 19, 1950 issued its mandate to the Circuit Court No. 2 of Baltimore City affirming its decision.

The appeal to the Supreme Court of the United States was allowed in response to a petition addressed to the

Chief Judge of the Court of Appeals of Maryland in an order dated July 10, 1950, which is included in this record. United States Code Title 28, Section 2101 (c) provides a period of ninety (90) days after the entry of a decree appealed from within which an appeal may be taken.

The Nature of the Case

Western Maryland Railway Company is an interstate common carrier by railroad conducting all the usual business of a Class I railroad company. By reason of the fact that it serves the port City of Baltimore, Maryland and maintains extensive piers on the harbor there, it transports to and from the port a substantial volume of export and import freight traffic.

Each year as required by the statutes of the State of Maryland it reports to the State Tax Commission its gross receipts from the transportation of freight and passengers for the preceding calendar year. Pursuing the statutory directions already quoted, the State Tax Commission apportions these gross receipts to the State of Maryland by the use of a percentage figure representing the relation of the all-track miles of the Western Maryland in the State of Maryland to its system all-track mileage. The gross receipts so apportioned become the measure of the tax which is then levied at the rates provided for in the statute.

In the years 1946 and 1947 the Western Maryland made its usual report of gross receipts earned in the calendar years 1945 and 1946 as the basis for determination of the franchise tax measured by these gross receipts for the years in which the returns were made. Subsequently, after consideration of certain decisions of the United States Supreme Court, the Western Maryland filed amended returns for these years in which the gross receipts earned in 1945

and 1946 from the transportation of imports and exports were eliminated from the gross receipts reported for use in measuring the tax. The exclusion of these gross receipts was based on the ground that Article I, Section 10, Clause 2 of the Constitution of the United States (the Import-Export Clause) as construed by the Supreme Court prohibited their use as the measure of the franchise tax.

The State Tax Commission obtained an opinion from the Attorney General of the State of Maryland, in which after a lengthy review of the authorities the Western Maryland's contention was rejected on the ground that the Supreme Court had not indicated "with certainty" that the contention was valid. 32 Op. Md. Atty. General 476. Thereafter, a hearing was held before the State Tax Commission at which the Western Maryland introduced detailed evidence with respect to the volume and character of its import and export traffic and identified the amount of its gross revenues earned in this manner. No witnesses appeared for the State and the testimony of the Western Maryland's witnesses were neither challenged, nor in any other manner contradicted. The Commission adhered to the opinion expressed by the Attorney General and declined to permit the Western Maryland to exclude from the measure of its gross receipts tax, the gross receipts earned from the transportation and handling of imports and exports. A final assessment of the tax including the gross receipts from imports and exports was subsequently made against the Western Maryland.

Because the Maryland statutes (Article 81, Section 196 of the Annotated Code of Maryland, 1939 Edition) provide that appeals from the State Tax Commission shall not operate to stay or affect the collection of taxes and that upon final decree any unpaid taxes may be refunded, the Western Maryland paid the gross receipts tax in full with

appropriate reservations of its right to refund should it ultimately prevail in this litigation. If the Supreme Court on this appeal decides that the Western Maryland's position is correct, it will be entitled to a refund of $26,024.00 of its 1946 tax payment and $51,432.47 of its 1947 taxes, and of like substantial amounts for the succeeding years.

An appeal from the decision of the State Tax Commission was pursued as permitted by the State statutes (Article 81, Section 194(b) of the Annotated Code of Maryland, 1939 Edition) to the Circuit Court No. 2 of Baltimore City where the Western Maryland renewed its charge that the inclusion of its gross receipts from the transportation and handling of imports and exports in the measure of the franchise tax was an unconstitutional application of the statute. After a hearing before the court on the record as made before the State Tax Commission, the Court wrote an opinion and signed an order in each case sustaining the action of the State Tax Commission and holding specifically, after a review of the decisions of the Supreme Court, that "it appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its effects on exports and imports or the process of exporting or importing as not to be in contravention of the constitutional clause already mentioned."

The Western Maryland pursued an appeal from this decision to the Court of Appeals of Maryland, the highest Court of the State, where it renewed its contention that the inclusion of gross receipts from the transportation and handling of imports and exports within the measure of the gross receipts tax was a violation of the Import-Export Clause of the Constitution of the United States. As already indicated, the Court of Appeals (two of six Judges dissenting) wrote an opinion and entered an order holding in substance that the Import-Export Clause is no more pro-

hibitive in effect than the Commerce Clause and that "we see no reason why a franchise tax measured by gross receipts including receipts from foreign commerce should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes."

The Federal Question Involved Is Substantial

1. The Court of Appeals of Maryland has construed Article I, Section 10, Clause 2 of the Constitution of the United States (the Import-Export Clause) to be no more prohibitive on State taxation than Article I, Section 8, Clause 3 (Commerce Clause), apparently reasoning that since the franchise tax imposed by the gross receipts tax law (Article 81, Section 95 of the Annotated Code of Maryland, 1939 Edition) is in lieu of property taxes which it assumed the State might validly impose, it is within the power of the State notwithstanding the express prohibition of the Import-Export Clause.

This is directly contrary to *Richfield Oil Corp* v. *State Board of Equalization*, 329 U. S. 69 (1946), because there the Supreme Court expressly declared that the reasoning by which State taxes may be held valid under the Commerce Clause cannot be written into the Import-Export Clause as qualifications upon it because the latter clause contains an express prohibition against "any" State taxation, excepting only that necesary for execution of inspection laws. The Court said, "the fact of a single exception suggests that no other qualification of the absolute prohibition was intended." (329 U. S. 69, 76). In that case, the State of California sought to sustain its franchise tax measured by the gross receipts from retail sales, through use of reasoning under the Commerce Clause by which State taxes which do not discriminate against interstate commerce have been sustained. In the present case, the

Court of Appeals of Maryland has used Commerce Clause reasoning relating to "in lieu" property taxes, and ignored the express prohibition of the Import-Export Clause. In so doing, it has not only incorrectly construed the Import-Expert Clause by failing to give due force and appropriate meaning to every word in that clause, as the Supreme Court has said is a necessary canon of constitutional construction (*Holmes* v. *Jennison*, 14 Peters 540, 570-571), but it has decided the case in a manner which was not open to the Court to do, in the light of the *Richfield Oil Corp.* v. *State Board of Equalization* case, *supra*.

In *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878) and *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917), Pennsylvania license taxes measured by gross receipts were held invalid under the Import-Export Clause to the extent that the gross proceeds of foreign commerce were included within the measure of the taxes.

The incorrect construction of the Constitution of the United States by the Court of Appeals of Maryland results in additional taxes improperly exacted from Western Maryland amounting to more than $75,000.00 for the two years here on appeal, alone. It is submitted, therefore, that the Federal question involved is substantial.

2. This appeal involves only the gross receipts taxes as imposed by the statutes of the State of Maryland. However, gross receipts taxes of one type or other are in force in a great many of the States of the United States. And in a number of them it appears likely that the same question presented by this appeal is or could be involved. See for example, *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), relating to the New York City franchise tax measured by gross receipts. A decision in the present appeal will furnish a guide which does not now exist for the proper construction of such statutes. In this connection,

the Attorney General of Maryland advised the State Tax Commission of Maryland that

> "until the Supreme Court indicates with certainty that the Import-Export Clause prohibits a State to include in the admeasurement of a franchise tax measured by gross receipts, revenues from the transportation of goods in the process of importation or exportation, it is our duty to advise you that the Maryland tax as presently assessed is constitutional." (32 Ops. 476, 484).

On the other hand, the Attorney General of the United States construed the Export Clause of the Constitution (Article I, Section 9, Clause 5) as prohibiting a Federal Transportation Tax on the receipts of railroads from the transportation of exported commodities. 31 Ops. U. S. Attorney General 329. For similar reasons the present United States Treasury Regulations (Regulations 113, Section 143.30) provide that the currently applicable Federal Transportation Tax "will not apply to an amount paid in the United States for transportation of property in course of exportation to a foreign destination."

The foregoing indicates as forcibly as possible the need for a direct decision on the point here raised. For this reason it is believed that a substantial Federal question is presented.

3. The critical question in the view which Appellant takes of this case is the simple one whether or not Appellant was engaged in the process of importing and exporting. This was not touched upon in the majority decision below. The dissenting Judges, however, said:

> "A tax on gross receipts from carriage of goods is manifestly a tax on exportation. Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation."

noring the fact that rail transportation and han-
f imports and exports is a part of the process of
ng and exporting which the Supreme Court has many
aid is protected from taxation by the Import-Ex-
l Export Clauses (*Fairbank* v. *United States*, 181
83 (1901); *United States* v. *Hvoslef*, 237 U. S. 1
Thames & Mersey Marine Insurance Co. v. *United*
237 U. S. 19 (1915); *Spalding & Brothers* v. *Ed-*
262 U. S. 66 (1923); *Willcuts* v. *Bunn*, 282 U. S. 216,
37); *Richfield Oil Corp.* v. *State Board of Equaliza-*
) U. S. 69 (1946)), the Court of Appeals of Maryland
a decision which is contrary also to the expressions
Supreme Court on ~~what~~ constitutes the process of
ng and exporting.

in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652
imported hemp was held still to be an import in
Ohio, after the conclusion of its rail journey from
of New York.

hames & Mersey Marine Insurance Co. v. *United*
supra, Mr. Justice Hughes said, "the rise in rates
rance as immediately affects exporting as an increase
ht rates."

irbank v. *United States, supra*, it was held that the
e of a bill of lading by a railroad company in Min-
was part of the exporting process.

recently in *Joy Oil Co.* v. *State Tax Commission*,
S. 286, 288 (1949), the Court said that "by the rail
it to Detroit one step in the process of exportation
n taken."

oseph v. *Carter & Weekes Stevedoring Co., supra*,
h the majority did not find it necessary to deal with
port-Export Clause, Justices Douglas and Rutledge
that loading and unloading by stevedores of
d goods was obviously a part of the "exporting

process". If handling by stevedores of goods on their foreign journeys is part of the exporting process, obviously handling by railroad is in no different category.

See also *T. & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111 (1913), and *Railroad Commission of La.* v. *Texas & Pacific Railway Co.*, 229 U. S. 336 (1913), holding that in the determination of whether foreign freight rates applied, it must be concluded that a railroad hauling freight destined to or from foreign ports is engaged in foreign commerce.

If a decision by the Court of Appeals of Maryland which is at variance with such a considerable body of law as developed by the Supreme Court is not reviewed, Appellant is denied important and substantial rights which appear to it to be established by the decisions of the Supreme Court of the United States. In addition, the law with respect to the scope of the Import-Export Clause fails to receive needed further clarification.

4. Appellant's reasons for believing that the Federal question in this case is substantial, may be summarized as follows:

(a) Because it is the only question in the case and the one on which Appellant bases its right to recover more than $75,000.00 in State taxes;

(b) Because the decision of the highest Court of Maryland is directly contrary to applicable decisions of the Supreme Court, including the most recent and most plainly governing decisions;

(c) Because the ultimate decision may be of more than local significance, and the existing law is not sufficiently definite as indicated by the refusal of the administrative authorities in Maryland to accept the present decisions of the Supreme Court as conclusive;

(d) Because the highest Court of Maryland ignored Appellant's contention that in transporting and handling goods in foreign commerce it is engaged in the importing and exporting process, and the Court thereby

reached a conclusion at variance with a number of expressions of the Supreme Court on what constitutes this process, which decision, in the interest of clarity and definiteness of the law, should be reviewed.

THEREFORE, Appellant, Western Maryland Railway Company submits that the Supreme Court of the United States has and should assume jurisdiction of this appeal under United States Code, Title 28, Section 1257(2).

Respectfully submitted,

WILLIAM C. PURNELL,
W. HARVEY SMALL,
Attorneys for Appellant,
506 Standard Oil Building,
Baltimore 2, Maryland.

Baltimore, Maryland, July 10, 1950.

(9240)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 205

WESTERN MARYLAND RAILWAY COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,
Appellees.

BRIEF FOR APPELLANT

W. HARVEY SMALL,
WILLIAM C. PURNELL,
Attorneys for Appellant.

Baltimore, Md.
November 20, 1950.

The Daily Record Co., Baltimore 3, Md.

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Appellees.

BRIEF FOR APPELLANT

OPINIONS OF THE LOWER COURTS

The opinion of the lower State Court, the Circuit Court o. 2 of Baltimore City, is not officially reported, but is pub-hed in The Daily Record, Baltimore, Maryland, January 1949.

The opinion of the Court of Appeals of Maryland is re-rted in *Western Maryland Railway Company v. State ax Commission* (1950), 73 Atlantic (2nd) 12.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

A statute of the State of Maryland, which is hereafter quoted (page 3), levies a franchise tax measured by gross receipts upon various business enterprises, including railroads. Appellant, in all the proceedings below, challenged the authority of the State officials charged with administration of the tax, to include gross receipts earned by appellant from the transportation of imports and exports, in the measure of appellant's franchise taxes for the years 1946 and 1947, on the ground that as thus applied the statute imposed a tax on imports and exports forbidden by Article I, Section 10, Clause 2 of the Constitution of the United States. The Court of Appeals of Maryland, which is the highest court of the State (two of six Judges dissenting), sustained the State administrative officials and the lower Court, and held that the statute as so applied was valid and was not in violation of the constitutional provision.

The jurisdiction of the Supreme Court to entertain this appeal is invoked under United States Code, Title 28, Section 1257, on the ground that appellant has drawn in question the constitutionality of the Maryland statute as applied in this case, and the final decision of the courts of the State has been in favor of the validity of the State statute.

STATEMENT OF THE CASE

Appellant, Western Maryland Railway Company, is an interstate common carrier by railroad conducting all the usual business of a Class I railroad company. Its lines extend through the States of Maryland, Pennsylvania and West Virginia, and it serves the seaport City of Baltimore where it maintains extensive piers on the harbor. As a result it transports to and from the port a substantial volume of goods which are moving over its railroad lines in the course

of importation from or exportation to foreign countries (R. 56).

Article 81, Section 95[1] of the Annotated Code of Maryland (1939 Edition) imposes a franchise tax upon railroad companies measured by their gross receipts. An annual report of such receipts is required to be made to the State Tax Commission[2], which is charged with the administration of the tax.[3] In the years 1946 and 1947, appellant, in pursu-

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[1] "95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

(1) All domestic or foreign railroad companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:

One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * *

(b) If any such railroad company has part of its road in this state and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

[2] Article 81, Section 96.

[3] Article 81, Section 97.

ance of the statutory requirement, made its usual report of all of its gross receipts from the transportation of freight and passengers earned in the calendar years 1945 and 1946, as the basis for determination of the franchise tax measured by these gross receipts for the years in which the returns were made (R. 1, 24A). Pursuing the statutory directions[4] the State Tax Commission apportioned these gross receipts to the State of Maryland by the use of a percentage figure representing the relation of the all-track miles of appellant's railroad in the State of Maryland to its system all-track mileage (R. 2-3, 24B-25). The gross receipts so apportioned became the measure of the tax which was then levied at the rates provided for in the statute (R. 4, 28).

Subsequently, after consideration of certain decisions of the United States Supreme Court, the appellant filed with the State Tax Commission of Maryland, protests[5] against inclusion of gross receipts earned from the transportation of freight in the process of importation into and exportation out of the United States, in the measure of the tax, on the ground that this is prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States,[6] forbidding taxation by any State of imports and exports (R. 19, 29). Appellant also filed amended returns for these years

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[4] Article 81, Section 95(b) quoted supra N. 1, page 3.

[5] Appellant's original protest for 1946 (R. 5) was based upon another point which was decided adversely to appellant in State Tax Commission v. Western Maryland Railway Company (1947), 188 Md. 240, involving appeals for the years 1942 to 1944. This original protest was amended (R. 19) to state the Import-Export Clause contention.

[6] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

in which the gross receipts earned in 1945 and 1946 from the transportation of imports and exports were eliminated from the gross receipts reported for use in measuring the taxes for 1946 and 1947, respectively (R. 8A-9, 26A-27).

The State Tax Commission referred appellant's protests to the Attorney General of Maryland, who rendered an opinion (R. 11) in which, after a lengthy review of authorities, he rejected appellant's contention on the ground that the Supreme Court has not indicated "with certainty" (R. 18) that the contention is valid. (Opinion reported in 32 Ops. Attorney General of Maryland 476). Thereafter, a hearing was held before the State Tax Commission at which appellant introduced detailed evidence with respect to the volume and character of its export and import traffic, and identified the amount of its gross revenues earned in this manner. No witnesses appeared for the State and the testimony of appellant's witnesses was neither challenged nor in any manner contradicted. Since these details, which constitute proof that the traffic involved was in fact import and export in character, and of the amount of gross receipts and the consequent tax involved, are not disputed (R. 24, 56) and need therefore not be considered by the Court in deciding this case, they have not been included in the printed record. The State Tax Commission concurred in the opinion expressed by the Attorney General of Maryland and ruled "that protestant's gross receipts taxes for the years 1946 and 1947 as assessed are constitutional" (R. 24).

Because the Maryland statutes[7] provide that appeals from the State Tax Commission shall not operate to stay the collection of taxes (R. 21, 30), and that upon a final determination of such an appeal the taxpayer may have a

[7] Article 81, Section 196, of the Annotated Code of Maryland (1939 Edition).

refund of any taxes paid in excess of the amount properly due, the appellant paid the gross receipts taxes for both years in full, with appropriate reservation of its right to refund should it ultimately prevail in this litigation.

As permitted by the applicable State statutes[8] appellant entered appeals to the Circuit Court No. 2 of Baltimore City, where it renewed its charge that inclusion of its gross receipts from the transportation and handling of imports and exports in the measure of the franchise tax was prohibited by the Import-Export Clause of the Constitution of the United States (R. 33, 36). After a hearing in that court on the record as made before the State Tax Commission (R. 35, 38), the Court wrote an opinion (R. 47) and signed orders (R. 39, 40) sustaining the action of the State Tax Commission. The Court held, after a review of the decisions of the Supreme Court that "it appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its affect on exports or imports or the process of exporting and importing as not to be in contravention of the constitutional cause already mentioned" (R. 53).

Appellant pursued appeals (R. 40, 41) from this decision to the Court of Appeals of Maryland, the highest Court of the State, where it again contended that the inclusion of gross receipts from the transportation and handling of imports and exports in the measure of the gross receipts tax, was a violation of the Import-Export Clause of the Constitution of the United States. As already indicated the Court of Appeals (two of six Judges dissenting) entered its opinion and order (R. 53) holding in substance that the Import-Export Clause is no more prohibitive in effect than

[8] Article 81, Section 194B, of the Annotated Code of Maryland (1939 Edition).

the Commerce Clause, and that "we see no reason why a franchise tax measured by gross receipts including receipts from foreign commerce should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes" (R. 62).

If the Supreme Court decides that appellant's position is correct it will seek refund of $26,024 of its 1946 tax payment (R. 35) and $51,432.47 of its 1947 taxes (R. 38), and of like substantial amounts in succeeding years.[9]

SPECIFICATION OF ERRORS RELIED UPON

Appellant relies upon all of the errors which it has assigned (R. 45-47). For convenience these may be summarized as follows:

(1) Assignments of Error Nos. 1 and 2 (R. 45) express the position of appellant that the Import-Export Clause prohibits the use of gross receipts from the transportation of imports and exports in the measure of a State franchise tax because this amounts to an impost upon imports and exports, which the constitutional clause forbids.

(2) Assignments of Error Nos. 3, 5 and 8 (R. 45-6) set forth appellant's contention that the transportation by railroad of goods in the course of their export journeys *is* the *process* of importing and exporting, *any* State taxation of which is forbidden under the Import-Export Clause as interpreted by this Court.

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[9] Appellant's evidence before the State Tax Commission indicated that the tax refunds would amount to $24,972.62 for 1946 and $53,990.60 for 1947 (R. 10). These amounts were based on mathematical errors which were corrected prior to filing the appeals in the Circuit Court No. 2 of Baltimore City, so that these appeals state the correct amounts. These facts are explained in a stipulated addition to the record in this Court which is not included in the printed record.

(d) Assignments of Error Nos. 4, 6 and 7 (R. 46-6) point out that the Court of Appeals of Maryland failed to recognize the distinction between the prohibitive scope of the Commerce Clause and that of the Import-Export Clause which this Court has pointed out, and therefore it made the mistake of validating the State tax by applying Commerce Clause reasoning to the Import-Export Clause, which is not a permissible means of construing the latter clause.

SUMMARY OF ARGUMENT

1. The Maryland tax cannot be removed from the prohibition of the Import-Export Clause either because it is imposed in lieu of taxes which the State might lawfully impose, or because its form is such that it is not an impost within the language of the constitutional provision. This Court has decided that the prohibition against "any" tax cannot be qualified and it, therefore, necessarily follows that an "in lieu" qualification is not permissible. This Court has also settled that the tax does not have to be directly on the goods to constitute a forbidden impost, but that if it is upon a business of rendering services in connection with imports and exports it is also prohibited. Excise and license taxes and franchise taxes measured by gross receipts, have likewise been held prohibited imposts when levied upon the privilege of engaging in exporting and importing. The Maryland tax is clearly within these definitions of an impost which the Constitution forbids. This leaves as the ultimate question to be decided simply whether the transportation by railroad of goods in the course of importation and exportation is part of the process of importing and exporting.

2. *Brown v. Maryland* determined that in the construction of the Import-Export Clause, the effect of the tax prohibition could not be limited to the goods themselves or to

the time at which they entered or left the country. The cases since have developed the rule that the entire "process" of importing or exporting must be excluded from State or Federal taxation in order to accomplish the purposes of the Import-Export Clause and the closely related Export Clause. The decisions under these clauses appear to turn upon the principle that at least any activity which is essential to the importing or exporting of goods is a part of the process. Transportation of the goods is obviously such an essential, and the various expressions of this Court on the point strongly indicate that it has acepted this as an unquestionable fact.

ARGUMENT

I.

The Maryland Franchise Tax Measured by Gross Receipts, is an Impost Forbidden by Article I, Section 10, Clause 2 of the Constitution When Applied to Gross Receipts from Importing and Exporting.

The opinion of the Court of Appeals of Maryland points out that a succession of Maryland cases has sustained the statutory declaration that the tax involved in this appeal is a franchise tax (R. 56). The Court, following the argument made to it by the State, then goes on to reason that because the tax is imposed in lieu of other State taxes (R. 56), because franchise taxes on gross receipts in lieu of property taxes have been sustained under the Commerce Clause (R. 58), and because it could see no more "prohibitive effect" in the Import-Export Clause than in the Commerce Clause, there is "no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes" (R. 62). By these mental processes it

reached the conclusion that the court below was correct in sustaining the application of the tax to gross receipts from import and export traffic. It might be noticed here that the court of first instance sustained the tax on a different ground, that is, that the railroads are not engaged in the business or process of importing and exporting, but in "an activity which merely assists other persons to engage in the business" (R. 52).

It seems necessary only to refer to *Richfield Oil Corporation v. State Board of Equalization,* (1946) 329 U. S. 69, 91 L. ed. 80 to demonstrate the error of the Court of Appeals' approach to the problem. In that case the Supreme Court of California likewise saw "no greater limitation on the power of the States under Article I, Section 10, Clause 2, than this Court has found to exist under the Commerce Clause." (329 U. S. 69, 74). And in argument it was contended that the Import-Export Clause was designed to prevent discriminatory taxes and not general taxes applicable alike to all goods. This Court rejected both of these positions, pointing out that the Import-Export Clause is cast in terms of a prohibition against taxes, while the Commerce Clause is a limitation upon the power of the scope of which is determined by the Supreme Court. In addition it was emphasized that the Import-Export Clause prohibits "any" State tax on imports or exports, and that this language may not be interpreted to read "any discriminatory" tax.

It, of course, follows quite clearly that although a State tax may be valid under the Commerce Clause because it does not discriminate against interstate commerce, such provides no like reason for sustaining a State tax against the prohibition of the Import-Export Clause. Nevertheless, the court below concluded that because "in lieu" State franchise taxes on gross receipts have been held valid under the Commerce Clause, they are for similar reasons valid

under the Import-Export Clause. If this Court in the *Richfield* case could not "read the prohibtiion against 'any' tax on exports as containing an implied qualification" (329 U. S. 69, 78) which would permit a non-discriminatory State tax, it obviously follows without difficulty that there is no implied qualification which would permit a State to tax imports or exports simply because the tax is in lieu of taxes which the State may impose.

The problem presented by this appeal appears to appellant to be a very simple one which in the final analysis resolves itself into a question of whether or not the transportation by railroad of goods on their import and export journeys is part of the "process" of importing and exporting. If it is, the constitutional prohibition applies because this Court has frequently said it is the "process" of importing and exporting which is removed from the realm of taxation. *United States v. Hvoslef*, (1915) 237 U. S. 1, 59 L. ed. 813; *Thames and Mersey Marine Insurance Co. v. United States*, (1915) 237 U. S. 19, 59 L. ed. 821; *Richfield Oil Corporation v. State Board*, supra; and *Cf. Wilcutts v. Bunn*, (1931) 282 U. S. 216, 228, 75 L. ed. 304.

However, it was argued at length below by the Attorney General of Maryland and will undoubtedly be again urged here, just as it was in the *Richfield* case, that because the Maryland tax is a franchise tax measured by gross receipts it is not an impost, and the constitutional prohibition cannot apply. It is, therefore, necessary to deal briefly with this argument, the answer to which is very clearly furnished by the several cases which are now referred to.

Brown v. Maryland, (1827) 12 Wheat. 419, 6 L. ed. 678, established at the outset of the construction of the Import-Export Clause that the prohibition is not limited to a State tax on the articles of commerce themselves. It will be

recalled that it was here held that the clause prohibited the State of Maryland from exacting a license tax for the privilege of importing goods and selling them in the original bales or packages in which they were imported. The Court in response to the State's argument that the tax was not on the articles, but on the person of the importer said:

> "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. * * * It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business [*sic*]. The lawyer, physician or the mechanic must either charge more on the article in which he deals or the thing itself is taxed through his person. This the State has a right to do because no constitutional prohibition extends to it. * * * So a tax on the occupation of an importer is in like manner a tax on importation. * * * This the State has no right to do because it is prohibited by the Constitution." (12 Wheat. 419, 444.)

Cook v. Pennsylvania, (1878) 97 U. S. 566, 24 L. ed. 1015, goes a considerable step further and shows that the prohibition of the Import-Export Clause includes a State tax which is neither on the articles of foreign commerce, nor on the person or business of the importer, but which falls upon the business of a person rendering services in connection with imports and exports. There a Pennsylvania license tax on the privilege of selling goods at auction, and based upon a percentage of the gross proceeds of auction sales, was held unconstitutional under the Import-Export Clause insofar as the proceeds of sales of imported goods in their original packages were included in the measure of the tax. The Court said that "the tax on sales made by an auctioneer is a tax on the goods sold, * * *."

An important additional factor is provided by *Crew-Levick Co. v. Pennsylvania*, (1917) 245 U. S. 292, 62 L. ed. 295, where it was held that a tax measured by the gross receipts from foreign commerce is a tax on that commerce itself and for that reason within the effect of the Import-Export Clause. There the taxpayer objected to a Pennsylvania mercantile license tax based upon the gross receipts of such business to the extent that gross receipts from merchandise sold and shipped from its Pennsylvania warehouse to foreign countries was included in the measure of the tax. This Court relied upon Commerce Clause cases holding that a tax upon the gross receipts from commerce is a tax upon the commerce itself, and said that to this extent there is no difference between interstate and foreign commerce. The Court said of the tax:

> "It operates to lay a direct burden upon every transaction in commerce by withholding for the use of the State a part of every dollar received in such transactions. * * * That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." (245 U. S. 292, 297.)

In *Anglo-Chilean Nitrate Sales Corporation v. Alabama*, (1933) 288 U. S. 218, 77 L. ed. 710, an Alabama franchise tax was held unconstitutional under the Import-Export Clause where the tax was exacted for the privilege of exercising the corporate franchise to conduct foreign commerce, and the measure of the tax was the value of goods imported from abroad.

Finally in *Richfield Oil Corporation v. State Board*, supra, the contested tax was held by the California Supreme Court to be an excise tax levied for the privilege of conducting a retail business and measured by the gross receipts from the sales of that business. This Court said that the question of

the validity of the tax "turns not on the characterization which the State has given the tax, but on its operation and effect." Since the delivery of the oil to the New Zealand vessel at Los Angeles which completed the sale and gave rise to the tax was considered by the Court to be "a step in the export process", the State's argument that the tax was not an impost within the meaning of the Import-Export Clause was rejected.

Applying these decisions to the present case we find that we have a Maryland tax which like *Brown v. Maryland* is not imposed directly on the articles of commerce, but like the tax in *Cook v. Pennsylvania,* is upon the business of rendering services in connection with imported and exported commodities. Like the tax in *Crew-Levick Co. v. Pennsylvania,* it is measured by the gross receipts from foreign commerce and is, therefore, upon the commerce itself, and like the tax in *Anglo-Chilean Nitrate Sales Corp. v. Alabama,* it is a franchise tax which, if transportation of exports and imports is foreign commerce, has been applied to the exercise of a corporate franchise to conduct the business of importing and exporting. And the *Richfield* case tells us that the form of the tax is not of consequence if the activities which give rise to it are a step in the process of importing and exporting.

It is, therefore, perfectly apparent that the application of this Maryland tax to gross receipts from the transportation of imported and exported goods is forbidden by the Import-Export Clause under the foregoing decisions, if the transportation of imports and exports by rail is a part of the business or process of importing and exporting. The fact that the tax is imposed in lieu of some other tax which the State might lawfully impose is not a matter of importance. This argument so much relied upon below and adopted

by the Court of Appeals, comes simply to the fact that, granted the State may impose a property tax or net income tax or some other form of tax, it has not done so, and has chosen instead a tax which, as applied here, is prohibited by the Import-Export Clause. That it might impose without constitutional difficulties a tax of another sort, but in lieu thereof has elected to impose a tax which as applied is prohibited by the Constitution, affords no justification for a construction of the expressly prohibitory language of the Import-Export Clause which would permit such a circumvention of its prohibition.

It seems hardly necessary to point out that the taxation of net income which in *Peck & Co. v. Lowe*, (1918) 247 U. S. 165, 62 L. ed. 1049, and *National Paper & Type Co. v. Bowers*, (1924) 266 U. S. 373, 69 L. ed. 331, was sustained against export clause objections, is obviously not authority for removal of gross receipts taxes from the effect of the Import-Export Clause, although relied on for this purpose by appellees below. In fact the difference between net and gross income taxation was apparently so evident to the Court that *Crew-Levick Co. v. Pennsylvania*, decided at the same term of Court and only a few months before *Peck & Co. v. Lowe*, was not referred to in either case. Professor Powell says that the object of commerce is the acquisition of net income, and in the taxation of net income it is this which is taxed rather than the processes of commerce (60 Harvard Law Review 501, 503). Or it may be said with equal reason, when dealing with the prohibition of the Export and Import-Export Clauses, that the conversion of gross income into net is analogous to the breaking of the original package which removes the articles of commerce from their character as imports or exports.

Similarly, the taxation of capital, although derived from sales of imported goods (*New York v. Wells*, (1908) 208

U. S. 14, 52 L. ed. 370), is as the Court said (208 U. S. 14, 24) merely taxation which *Brown v. Maryland* recognized as permissible after breaking the original packages.

New York ex rel. Parke Davis & Co. v. Roberts, (1898) 171 U. S. 658, 43 L. ed. 323, also much relied on by appellees, sustained a New York State franchise tax measured by capital employed in its business which included both local and foreign commerce. It seems to appellant insofar as this case contains any implication that a State franchise tax on capital may be measured by the value of imported goods in their original packages it is in substance overruled by *Anglo-Chilean Nitrate Sales Co. v. Alabama*, supra. But, however that may be, the latter case says that the decision in *New York ex rel. Parke Davis & Co. v. Roberts*, had no application to a franchise tax measured entirely by the value of imports. It seems, therefore, to be authority only for the proposition that if local business is conducted a State franchise tax measured by capital employed, is not objectionable under the Import-Export Clause if the measure of the tax may be entirely local assets.

Appellees also made considerable reference below (Cf. p. 5) to *Inter-Island Steam Navigation Co. v. Territory of Hawaii*, (1938) 96 Fed. (2d) 412, (affirmed on other grounds in this Court, 305 U. S. 306, 83 L. ed. 189), although the case received no attention from either of the Maryland Courts. It seems probable that the fee which was the subject of dispute in this case, and which was levied by the Territorial Public Utility Commission for support of its investigative and regulatory activities, was in fact an inspection fee permitted by the Import-Export Clause, and this may explain why that objection was not presented on the appeal to this Court. In any event to the extent that the lower Federal Court concluded that the fee measured by gross receipts was not a tax on the privilege of importing and exporting, it

appears to have overlooked *Crew-Levick Co. v. Pennsylvania.* And, of course, in the light of the *Richfield* case, since decided the *Inter-Island* case is no longer an authority.

We now turn to consideration of the problem of whether or not rail transportation of goods in their import and export journeys is a part of the process of importing and exporting.

II.

Transportation by Railroad of Goods in the Course of Importation and Exportation is a part of the Process of Importing and Exporting

The dissenting Judges below had no difficulty with the subject for they say, "Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation" (R. 68). However, the Circuit Court No. 2 of Baltimore City thought otherwise (R. 52), and the Attorney General of Maryland when first considering the problem was uncertain of this Court's views (R. 18).

It appears to appellant that a description of the various activities held by this Court to constitute part of the exporting or importing process leaves no room whatever for doubt that transportation is as much, if not more, a part of the business than the processes which have already been held to be embraced within the business of importing and exporting. In reviewing the cases no distinction is drawn between those decided under the Export Clause[10] and those decided under the Import-Export Clause, since for present purposes they are of like effect. cf. *Richfield Oil Corp. v. State Board of Equalization,* (1946), 329 U. S. 84, 85; 91 L. ed. 80.

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[10] Article I, Section 9, Clause 5 of the Constitution.

When *Brown v. Maryland* was before this Court it was fully recognized that the prohibitory aspect of the Import-Export Clause could not be effectuated by confining its effect to taxes levied directly on goods which are the subject of foreign commerce, or to taxes levied only at the point of time at which the goods enter or leave the country, for as said by Mr. Justice Hughes many years later, "If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it." *United States v. Hvoslef*, (1915) 237 U. S. 1, 13, 59 L. ed. 813. Consequently Chief Justice Marshall concluded that the determination must be "whether the act is within the words *and* mischief of the prohibitory clause." It was, therefore, decided in *Brown v. Maryland* that the prohibition embraced taxes on the business of selling imported goods so long as they remain in their original packages as well as taxes on the goods themselves. Subsequent cases following this reasoning have developed the principle that the clause covers any step in the "process" of importing or exporting, and it appears that the process at least consists of any activity which is *necessary* in order that goods may be imported or exported.

For example, *Almy v. California*, (1861), 65 U. S. 169, 16 L. ed. 644, held that the issuance of an ocean bill of lading was so much a part of the exporting process that a tax on the bill was "in substance the same thing" as a tax on the articles exported. The Court said that this was so because a bill of lading is "necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another." (65 U. S. 169, 174).

In *Fairbank v. United States*, (1901) 181 U. S. 283, 45 L. ed. 862, an agent of the Northern Pacific Railroad issued

an export bill of lading in Minnesota covering an export shipment of wheat. The Court said the bill of lading "evidences the export" and was therefore freed from Federal stamp taxes by the export clause of the Constitution. If the wheat was an export in Minnesota when the bill of lading was issued, obviously the rail transportation thence to the seaport was just as necessary to its exportation as the bill of lading which authorized it to be shipped over the railroad towards the destination which give it an export character.

United States v. Hvoslef, (1915) 237 U. S. 1, 59 L. ed. 813, held that a charter party, a clearly necessary element of securing ocean transportation for goods in the course of being exported, was a part of the "process of exporting".

Insurance, from a business standpoint at least, is a necessary element of import and export trade. In *Thames & Mersey Marine Insurance Co. v. United States*, (1915) 237 U. S. 19, 59 L. ed. 821, it was held that the issuance of insurance policies covering marine risks is part of the exporting process. In this case, the Court speaking through Mr. Justice Hughes said, "It cannot be doubted that insurance during the voyage is, by virtue of the demands of commerce, an integral part of the exportation; the business of the world is conducted upon this basis. * * * Proper insurance during the voyage is one of the necessities of exportation. The rise in rates for insurance as immediately affects exporting as an increase in freight rates" (237 U. S. 19, 26-7). Obviously in making these statements, the Court assumed it to be unquestionable that transportation is the basic process of exportation, and if, as it said, taxation of insurance policies "does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process", there seems no escape from the con-

clusion that transportation is likewise not a preliminary, but is a necessary part of the process.

In *Coe v. Errol,* (1886) 116 U. S. 517, 29 L. ed. 715, the Court sustained against a Commerce Clause objection a New Hampshire tax on logs cut in that State and being held in a river for subsequent transportation to Maine. But in so doing it said that goods are not detached from the general mass of property in the State "until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." (116 U. S. 517, 526). This rule, which has been frequently followed, established definitely that the process of commerce begins when the goods have been committed to a common carrier. Consequently transportation by the common carrier is of necessity a part of the process of commerce and, therefore, of importing and exporting.

In *Spalding & Bros. v. Edwards,* (1923) 262 U. S. 66, 67 L. ed. 865, the Court regarded selling exports as part of the export process.

As already pointed out, *Cook v. Pennsylvania,* (1878) 97 U. S. 566, 24 L. ed. 1015, held that the services of an auctioneer in selling imported goods was sufficiently a part of the importing business to achieve the protection of the Import-Export Clause. Certainly these services were in no sense as necessary to the conduct of the importing business as transportation from the seaport to the point of sale, and this case may therefore indicate that even non-essential services to imported goods belong to the importing or exporting process so long as they constitute part of the normal course of the business.

In *Puget Sound Stevedoring Co. v. Tax Commission,* (1937) 302 U. S. 90, 82 L. ed. 68, the Court felt that steve-

doring services were so obviously a part of foreign commerce that it was prepared to take judicial notice of the fact that this is so. If, as the Court said, "transportation of cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination," it is equally essential that the things to be exported be brought by inland transportation by rail or otherwise to the point where they can be put aboard the ship, and on the other hand it would be futile to put imported goods ashore unless the transportation were available to convey them to their destination.

In *Hooven & Allison v. Evatt,* (1945) 324 U. S. 652, 89 L. ed. 1252, imported hemp which had been transported by rail from New York City to Xenia, Ohio, where it was stored in a warehouse in its original packages, was held by this Court to be still an import. It must necessarily follow that the process of importation continued through the arrival of the hemp in Xenia, and this process obviously was the rail transportation from New York City.

In the *Richfield* case, this Court observed that the delivery of oil by conveying it from the storage tank to the vessel "was a step in the export process." The opinion relates that the start of the process of exportation "may normally be best evidenced by the fact" that the goods "have been delivered to a common carrier for that purpose", but that the delivery from the tank to the vessel was just as clearly the beginning of the export journey as if the oil had "been delivered to a common carrier at an inland point." Just as observed above in discussing the *Thames & Mersey Marine Insurance* case, the assumption is apparent that transportation by a common carrier is an unquestioned step in the export process and therefore also in importing.

Empresa Siderurgica, S. A. et al. v. County of Merced, et al., (1949) 337 U. S. 154, 93 L. ed. 1276, adds emphasis to the significance of transportation as an essential element of exportation because no attempt was made by the local authorities to tax the portions of the dismantled cement plant which had been delivered to a rail carrier for export shipment. In sustaining, against the Import-Export Clause objection, the local tax on the part that had not been shipped, this Court again observed "it is the entrance of the articles into the export stream that marks the start of the process of exportation."

In *Joy Oil Co., Ltd. v. State Tax Commission*, (1949) 337 U. S. 286, 93 L. ed. 1366, this Court finally said explicitly that rail transportation is a part of the process of exportation. In sustaining a Michigan property tax on gasoline stored for fifteen months, although destined for export, the Court held that the long delay deprived the gasoline of the character of an export, notwithstanding the fact, recognized in the opinion by Mr. Justice Frankfurter, that "by the rail shipment to Detroit, one step in the process of exportation had been taken."

Appellant finds particularly significant the separate expression of Mr. Justice Douglas in *Joseph v. Carter & Weekes Stevedoring Co.*, (1947) 330 U. S. 422, 91 L. ed. 993, where the majority of the Court held that because stevedoring "is essentially a part of the commerce itself", a New York City privilege tax measured by the gross receipts from the loading and unloading of imports and exports was a tax upon the business itself and, therefore, invalid. While the majority decided the case under the Commerce Clause, Mr. Justice Douglas (joined by Mr. Justice Rutledge) thought that the tax was invalid only under the Import-Export Clause. His expression on this point fully sustains this appeal because he holds that a tax measured

by the gross receipts from transportation of imported and exported goods, which is the essential nature of stevedoring services (330 U. S. 422, 427), is prohibited by the Import-Export Clause. His opinion on this point follows:

> "Second. I think the tax is unconstitutional insofar as it reaches the gross receipts from loading and unloading vessels engaged in foreign commerce. Such a tax is repugnant to Article I, Section 10, Clause 2, of the Constitution which provides that 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws * * *'
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> "*Loading and unloading are a part of the 'exporting process' which the Import-Export Clause protects from state taxation.* See Thames & Mersey M. Ins., Co. v. United States, 237 U. S. 19, 27, 59 L. ed. 821, 824, 35 S. Ct. 496, Ann Cas 1915 D. 1087. Activity which is a 'step in exportation' has that immunity. A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 68, 67 L. ed. 865, 867, 43 S Ct 485. As the Court says, loading and unloading are 'a continuation of the transportation.' Indeed, the commencement of exportation would occur no later. See Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 91 L. ed. 80, 67 S Ct 156. And the gross receipts tax is an impost on an export within the meaning of the Clause, since the incident 'which gave rise to the accrual of the tax was a step in the export process.' Richfield Oil Corp. v. State Bd. of Equalization, supra.
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> "As we pointed out in that case, the Commerce Clause and the Import-Export Clause 'though complementary, serve different ends.' 329 U. S. p. 76, 91 L. ed. 89, 67 S. Ct. 156. Since the Commerce Clause does not expressly forbid any tax, the Court has been free to balance local and national interests. Taxes designed to make inter-state commerce bear a fair share of the cost of local government from which it receives bene-

fits have been upheld; taxes which discriminate against interstate commerce, which impose a levy for the privilege of doing it, or which place an undue burden on it have been invalidated. *But the Import-Export Clause is written in terms which admit of no exception but the single one it contains.* Accordingly a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause. For me the present tax is a good example." (our Italics) (330 U. S. 422, 444).

This discussion should probably not be concluded without reference to *Texas & New Orleans Railroad Co. v. Sabine Tram Co.*, (1913) 227 U. S. 11, 57 L. ed. 442, and *Railroad Commission of Louisiana v. Texas & Pacific Railway Co.*, (1913) 229 U. S. 335, 57 L. ed. 1215, where this Court held that for the intrastate rail transportation of goods in the course of their export journey to the seaport and thence to a foreign destination, the railroads were entitled to charge the rate applicable to foreign commerce. It is a necessary element of these decisions that the rail transportation was considered a part of the exporting process, otherwise the export rate could not have been applied.

Reference should also be made to the fact that the Attorney General of the United States ruled that the World War I Federal excise tax on the transportation of goods was not applicable to exports because of the prohibition contained in the export clause, basing his opinion principally upon the *Thames & Mersey Marine Insurance Company* case. See 31 Opinions U. S. Attorney General 329. The regulations of the Treasury Department governing the application of the present Federal transportation tax contains a similiar prohibition against the collection of the tax on property in the course of export and significantly says "property will be considered to be in the course of exporta-

tion from the time of delivery to a carrier in the United States for transportation by continuous movement to a point beyond the boundaries of the United States." (Treasury Regulations 113, Section 143.30, published in 494 CCH, Paragraph 2766C).

In the light of the foregoing decisions it is difficult to understand how Judge Sherbow in the Circuit Court No. 2 of Baltimore City could have come to the conclusion that the Maryland tax "is an impost not upon the business or process of importing and exporting but upon an activity which merely assists other persons to engage in that business." This seems directly contrary to *Cook v. Pennsylvania*, supra, and is obviously at variance with the *Thames & Mersey Marine Insurance Co.* case, and with Mr. Justice Douglas' expression in the *Joseph v. Carter & Weekes* case. It is also difficult to understand the uncertainty of the Attorney General of Maryland on the subject. Perhaps we may infer from the method by which the majority of the Court of Appeals sustained the tax, that they, at least, were certain that transportation of imports and exports is necessarily a part of the process of importing and exporting, and therefore the only other way of evading the constitutional provision was by the "in lieu" argument which the Court adopted.

In the court below, the Attorney General of Maryland contended at some length that the tax can not be prohibited by the Import-Export Clause because it is measured by gross receipts derived from transportation performed on goods which have been imported, or before they are exported. It is hard to see how such a contention is admissible in the light of the cases hitherto referred to, particularly *Coe v. Errol* and *Fairbank v. United States*. However, this very line of reasoning was examined by Chief Justice Marshall in *Brown v. Maryland* and rejected.

"* * * Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

"If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited." (12 Wheat. 419, 438).

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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